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92
No. 2405

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. DREW CAMINETTI,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

REPLY TO BRIEF OF SPECIAL ASSISTANT TO THE ATTORNEY GENERAL.

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Filed this..... day of January, 1915.

Filed

FRANK D. MONCKTON, Clerk.

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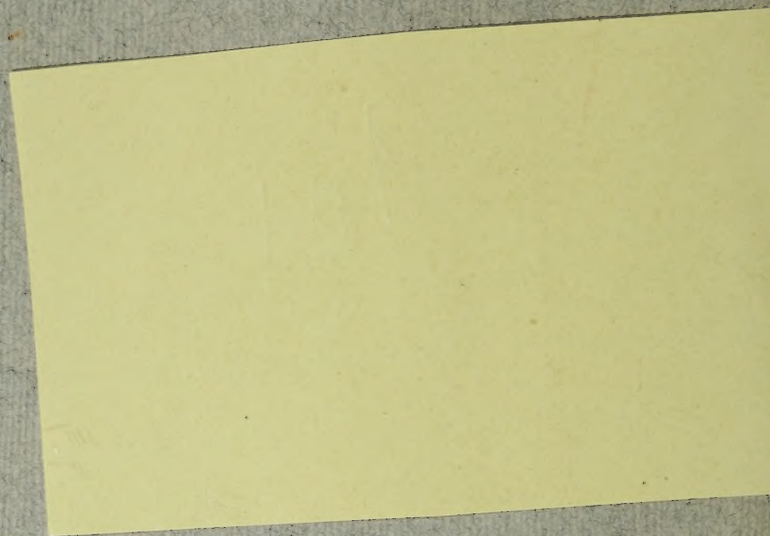
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In view of some of the arguments advanced by the Special Assistant to the Attorney General, we are compelled to make a brief reply.

Furthermore, when this case was called for argument, Mr. Roche stated that he did not have his brief prepared, and asked time to file it later. This was granted, and the plaintiff in error, called throughout the defendant, was allowed to reply, if he desired the privilege. The oral argument was limited in its scope, but the brief filed by Mr. Roche covers a wide field. We, therefore, submit the following reply:

I.

A considerable portion of the brief for the government is devoted to facts antedating the Reno trip, enlarged on for the purpose of showing moral depravity on the part of the defendant. But, taking the testimony quoted in the brief, as well as that not referred to in the brief, but contained in the transcript, it shows:

1. That the defendant Caminetti did not buy any transportation for either Lola Norris or Marsha Warrington.

2. That the defendant Caminetti did not furnish any moneys with which any transportation was bought for either Lola Norris or Marsha Warrington.

3. That there is no competent, legal, or any, evidence that the defendant Caminetti had agreed or had any understanding with Diggs to reimburse him for the furnishing of any transportation for Lola Norris or Marsha Warrington.

4. That the defendant Caminetti did absolutely nothing to transport, or cause to be transported, or aid and assist in obtaining transportation for, Lola Norris or Marsha Warrington.

5. That he did absolutely nothing in violation of the "White slave traffic Act", nor did he have the intent and purpose denounced by the "White slave traffic Act" and alleged against him in the indictment, to wit: "that the aforesaid Lola Norris

should be and become the concubine and mistress of the said defendant”.

6. That the intent of concubinage was not formed and did not exist, according to the testimony of Marsha Warrington and Lola Norris, until after the boundary line separating California and Nevada had been passed.

7. That no sexual relations, according to the testimony of Lola Norris herself, existed between herself and the defendant Caminetti, until after reaching Reno.

8. That both parties were guilty of culpable conduct.

9. That such conduct could have been prosecuted under the state laws, and, in fact, both parties were arrested for violations of the state laws and such charges were pending against them both when Lola Norris and Marsha Warrington, who was also under arrest upon similar charges, testified against the defendant.

10. That to constitute the trip to Reno a crime, it was necessary that it should have been taken for the *purpose* stated in the indictment, or at least for a *purpose* denounced by the “White slave traffic Act”. The *purpose* is the gist of the offense. The evidence quoted by Mr. Roche shows that such was not the purpose of the trip.

11. It was proven by the defendant that he had been *told* that he and the girls were about to be arrested, and he believed it to be true. The wit-

nesses, who told him this, were produced and so testified. The prosecution attempted to prove that no warrant had been issued for his arrest. This was true, but did not affect the fact that *he had been told* that such a warrant was to be issued.

12. The plaintiff had also been *told* by one of the girls that a reporter on a local paper was about to publish an account of their escapades. Lola Norris said she had been so informed by Marsha Warrington. The prosecution attempted to contradict this, not by showing that he was not so *told*, but that such a tale was not, in fact, to be published. This was not a contradiction of the fact that the defendant had been *so informed*.

13. The father of Maury Diggs was about to have him arrested. This is uncontradicted.

14. The father of Maury I. Diggs had threatened to complain about his conduct to the Board of Control, where defendant Caminetti was employed, and to have him discharged as a public employee on the ground that he was unfit to hold such position. This also is uncontradicted.

15. All the testimony quoted by Mr. Roche shows conclusively that the *purpose* of the trip to Reno was to escape notoriety and arrest.

Such testimony, measured by its legal effect, while it may show moral delinquency, does not show the commission of the crime charged in the indictment. But, a jury, who cannot differentiate between what constitutes a state offense and a fed-

eral offense, is apt to think that a defendant should be convicted on general principles, and this, we contend, was what was done in the Court below. The defendant was not placed on trial for moral delinquency, but for a specific offense. Nor was he on trial for a conspiracy to violate the "White slave traffic Act". We have no quarrel with the authorities, cited by counsel for the government on pages 131-137 of their brief, with reference to the rule that declarations and admissions of an accomplice to crime, made while the conspiracy exists, are admissible in evidence against an accomplice. But, we do maintain that the evidence must not only show that the defendant Caminetti was guilty of a conspiracy (which, however, was not the charge upon which he was being tried), but that he did some *specific act* with the *specific purpose* denounced by the "White slave traffic Act" and alleged against him in the indictment. We submit that it is not simply sufficient for the prosecution, under the allegations of the first count of the indictment, upon which alone the defendant Caminetti was convicted, to show that he was guilty of a conspiracy, without also showing that he committed the *specific act* with the *specific intent* with which he was charged in the first count of the indictment. In their reply brief, counsel for the government, while indulging in a mass of glittering generalities, do not, and indeed are not able, to point to a single thing that the defendant Caminetti did in furnishing the transportation from Sac-

ramento to Reno for Lola Norris, with the unlawful purpose charged against him. He did not buy the railroad or Pullman tickets. He did not furnish the moneys or means with which to buy the tickets. He was acquitted of having persuaded, enticed or induced Lola Norris to leave Sacramento for Reno for any immoral purpose. There is no competent, legal, or any evidence that he ever agreed to reimburse Diggs, who purchased the tickets and furnished the transportation both for Lola Norris and Marsha Warrington, and who now stands convicted for such purchase of said tickets, his case now also pending before this Honorable Appellate Tribunal on a writ of error. In other words, it must be manifest that the defendant Caminetti was convicted of the doing of a specific act with a specific intent upon general principles and because of the many erroneous and prejudicial rulings of the trial Court and of the acts of misconduct of the prosecuting attorneys.

A great deal of the testimony admitted against the defendant was upon the theory, repeatedly announced by the trial Judge, that the prosecution of the defendant was one akin to a conspiracy, and many things that Maury I. Diggs said and did, and many things that Marsha Warrington said and did, were permitted to be introduced in the prosecution against the defendant upon the theory that he was a conspirator. The evidence shows that many of the things said and done by Diggs and Marsha Warrington were unknown to the defend-

ant Caminetti and that he had nothing to do with them and could not have known of them and did not suggest or assist therein. For instance, the fact that Diggs and Marsha Warrington had sexual relations and that Marsha Warrington was pregnant by Diggs, and many things that Diggs said and did without the presence of the defendant Caminetti, were permitted to be introduced in evidence against the defendant, when it affirmatively appears from the evidence in the record that he had nothing to do with the sexual relations existing between Diggs and Marsha Warrington and that he was not even aware that such an act had taken place when it first occurred, for Marsha Warrington herself testified that she never told the defendant Caminetti of what had happened sexually between herself and Diggs (Transcript of Record, p. 280).

Counsel for the government, in their brief, on page 186, make the bold assertion that: "In the case at bar there is an absolute plethora of evidence establishing beyond question the guilt of the accused." We deny this asseveration and state, confidently, that the Transcript of Record discloses that there is a "manifest paucity of evidence tending to establish the guilt of the defendant" of the *specific charge* of the *doing of the specific act* with the *specific intent*, of which he was accused and convicted on the first count of the indictment.

True, there is a mass of evidence of occurrences and statements and things that were done for a considerable time previous to the trip to Reno, but

there is not a scintilla of evidence that the defendant Caminetti transported, or caused the transportation, or aided or assisted in obtaining transportation for Lola Norris, for the immoral purpose set out in the indictment.

True, the prosecution, owing to the liberality of the trial Judge who likened the prosecution to one akin to a conspiracy, was permitted to show automobile trips, carried on by Diggs and participated in by Caminetti, from Sacramento to San Francisco, to San Jose, to Stockton, to Jackson, and other places; but this did not supply or supplant evidence that the defendant Caminetti had furnished railroad transportation for Lola Norris from Sacramento to Reno for any immoral purpose. In other words, a great deal of evidence was admitted about *everything* excepting the one single issue, to wit: What did the defendant Caminetti *do to furnish transportation* for Lola Norris from Sacramento to Reno?

There is absolutely no evidence that he did anything to furnish transportation, or cause the transportation, or aid or assist in the transportation, of Lola Norris with the intent and purpose, existing at the time of the commission of any act by him, alleged in the indictment. If he did do anything, it is extremely strange that the learned and astute special prosecutors have not been able, in a brief covering 265 pages, to point to a single act done by the defendant Caminetti to support the charge and conviction upon the first count of the indictment

that he transported, or caused the transportation, or aided or assisted in the transportation of Lola Norris with the intent and purpose alleged against him.

The strongest that the prosecution now claims against the defendant Caminetti is that he had some understanding or agreement with Diggs to reimburse the latter for his furnishing of transportation for Lola Norris. But, as pointed out in our opening brief, there is no competent, or legal, or any evidence that the defendant Caminetti ever agreed or intended to reimburse Diggs for any furnishing of railroad transportation made by Diggs for Lola Norris.

It is to be observed in this connection, that Diggs was convicted of furnishing the very same transportation for Lola Norris, and that his case is now pending before this appellate tribunal upon his conviction on that charge.

II.

Addressing ourselves, next, to the proposition maintained, on the part of the government, that "the accused having voluntarily taken the witness stand waived *all* immunity" (see subdv. IV, pp. 73-90), it will be noted that counsel for the government constantly confuses and confounds the failure or refusal of a defendant to *answer proper and material questions actually put to him on cross-examination* with a radically different situation existing in the case at bar where it appears that the defendant *never refused to answer any proper or material questions* and, in fact, was *not cross-examined at all*.

We respectfully submit, as too plain for argument, that it is one thing, in the law, for a defendant to fail or refuse to *answer proper and material questions*, and that such failure or refusal to answer proper and material questions may be commented upon by the prosecuting attorney in his argument to the jury; and that it is quite another and different thing to permit the prosecuting officer to comment upon the fact that the defendant did not explain or deny certain matters when the prosecuting attorney did not see fit to ask him to explain or deny the matters referred to by him in his argument to the jury; in fact, did not see fit *to cross-examine the defendant at all*.

We concede that, if the defendant in the case at bar had been cross-examined by the prosecuting attorney and had either failed or flatly refused to

answer proper and material questions actually put to him, his conduct in that connection and his failure or refusal could be commented upon by the prosecuting attorney.

But that is not the case at bar. The defendant Caminetti never refused or failed to answer any proper or material questions. He was not cross-examined.

Such being the facts, how can the several authorities and passages from text books relating to the failure or refusal of a defendant "to answer proper and material questions" be deemed applicable?

We contend that the instruction of Judge Van Fleet, on the question of defendant's failing to testify to certain facts, could be used against him, as a matter of law, was erroneous. We contend that it placed an undue burden on the defendant. We maintain that it was misleading. This instruction, or one of similar import, is condemned in

Balliet v. United States, 129 Fed. 689, 696.

In no case has such an instruction been upheld.

Conceding that *counsel in his argument* may comment upon the matter without error, this is quite a different thing from the Court *instructing the jury*, as a matter of law. Many Courts hold that even counsel cannot comment upon it at all. No Court holds that the Judge can give an instruction, such as was given in this case.

Speaking of the Balliet case, Mr. Roche, in his reply brief in the Diggs case in this appellate Court, says (page 88) :

“If it asserts the doctrine claimed by counsel and is the leading case on the subject, it is somewhat remarkable that it has never been, at any time, cited by any federal court as sustaining the doctrine here contended for by plaintiffs in error.”

In reply, we may say that this case has never been repudiated by any Court, and that probably the Diggs and Caminetti cases and the Balliet case are the *only cases* in which such an instruction has been given. Mr. Roche, in his elaborate brief, presents, and, we assume, in view of his great industry and research, has been able to find no case in which such an instruction has been upheld. The best that he can do is to present cases in which counsel in argument have been allowed to comment. Counsel may be mistaken, and the jury may disregard everything that he says, but, in a jury trial, the jury *must* take the law as the Court gives it to them, and if the Court gives them that which is not the law on a material point to a defendant's disadvantage, the defendant has not had that legal trial to which he was entitled.

It is not necessary to repeat the language of the Court of Appeals in the Eighth Circuit in the Balliet case showing why such an instruction is erroneous, misleading and prejudicial.

The instruction, given in the case at bar, as in the Balliet case, certainly went entirely too far. While it may be conceded that the instruction in the case at bar did not go as far as that delivered in the case of Maury I. Diggs v. United States, No. 2404, now pending in this appellate tribunal (see the difference between the instruction in the case at bar and in the case of Diggs v. United States set out on page 85 of our opening brief), still, in its emasculated and modified form, it is equally erroneous and constitutes reversible error. Such an instruction clearly comes within the denunciation of the Circuit Court of Appeals in the Balliet case. Such an instruction is unfavorable and prejudicial to a defendant. It places him in a most unfavorable and prejudicial attitude before the jury. It indicates a hostile attitude on the part of the trial Judge. It places an undue burden upon a defendant, requiring him to explain or deny *everything* of an incriminating nature. It is misleading. The jury is not informed what acts of an incriminating nature the defendant must explain or deny.

As was well said by the Supreme Court of the United States, in the case of Hicks v. United States, 150 U. S. 442; 37 L. Ed. 1137, 1138, 1141:

“Still it must be remembered that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, *to whose lightest word the jury, properly enough, give a great weight*, should intimate that the dread-

ful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that 'the person charged shall, at his own request, but not otherwise, be a competent witness.' *The policy of this enactment should not be defeated by hostile comments of the trial judge, whose duty it is to give reasonable effect and force to the law.*"

The instructions of the trial Court, in the case just cited, were not nearly as prejudicial as the instructions in the Balliet case and in the case at bar, and yet the Supreme Court declared that:

"The policy of this enactment should not be defeated by hostile comments of the trial Judge, whose duty it is to give reasonable effect and force to the law."

We have made a most painstaking examination of every authority or statement of a text writer referred to by the able counsel for the government in their brief.

Briefly, we refer to the authorities and statements of the law cited by counsel for the government to show their utter inapplicability to the case at bar.

On pages 73-74 of the government brief, counsel refers to "the rule on the subject" contained in 12 Cyc., pp. 576-7. But "the rule on the subject" referred to relates to the proposition that:

"The prosecuting attorney then has the same rights to attack his (defendant's) credibility in argument or to comment upon his testimony or upon his failure or refusal to answer proper and material questions within his knowledge as in the case of any other witness."

That is not this case. The defendant Caminetti never refused to answer any proper or material questions on cross-examination. Had counsel for the government read a little further in Cyc., Vol. 12, on the next pages, 577-578, he would have found the rule applicable to the situation in the case at bar stated as follows:

“In those states where the accused is subject to cross-examination only as to those matters testified to on his direct examination, the prosecution *cannot comment upon his silence on cross-examination as to matters not touched upon in direct examination.*”

In the federal Courts and in the Courts of the State of California, the right of cross-examination is restricted to matters inquired of in chief.

12 Cyc., 577, 578;

People v. McGungill, 41 Cal. 429;

People v. Saunders, 114 Cal. 216;

State v. Elmer, 115 Mo. 401; 22 S. W. 369;

State v. Fairlamb, 121 Mo. 137;

State v. Baldoer, 88 Iowa 55;

Balliet v. United States, 129 Fed. 689;

United States v. Mullaney, 32 Fed. 370;

Sec. 13, Art. 1, Const. of Cal.;

Sec. 1332, Cal. Penal Code.

In the case of United States v. Mullaney, just cited, Mr. Justice Brewer said:

“Of course, cross-examination is, in the federal Courts, limited to the matter of the direct examination, and cannot extend beyond the

facts and circumstances which are a part of or connected directly with the subject matter of the direct testimony.”

The case of *State v. Ober*, 52 N. H. 549; 13 American Reports 88, “a case frequently cited on this subject”, as counsel for the government informs us on page 74 of his brief, is absolutely inapplicable and relates to a refusal of a defendant, in that case, “to submit to a full cross-examination, within proper limits”. That is not this case. The defendant Caminetti never refused to submit to a full cross-examination within proper limits, and was not asked a single question on cross-examination.

The case of *People v. Mead*, 145 Cal. 500, cited on page 79 of the government brief, is not applicable at all, because in that case it appeared “that the defendant had testified *equivocally* on that subject and denied the marriage, if at all, only by implication”. It was held that the prosecuting attorney had the right to comment upon the *equivocal* manner in which he testified and denied the marriage. That is not this case.

The same may be said of another California case cited by counsel for the government on page 79 of his brief, the case of *People v. Wong Bin*, 139 Cal. 65, 66. In that case, the defendant took the stand and “went *fully* into the details of the difficulty, claiming that the killing was in self-defense”. Having gone *fully* into the subject, it was held that “under these circumstances the district attorney

was authorized in commenting upon his failure to deny certain alleged statements testified to by other witnesses to have been made by him, *inconsistent with his testimony given on the trial*". The Supreme Court immediately qualified this language by adding:

"The question thus presented is *very different* from the case where the defendant is not a witness at all, *or a witness only as to some formal matter.*"

On page 81 of the government brief, counsel make the bold declaration that:

"The rule is recognized and enforced by the Supreme Court of the United States in *Fitzpatrick v. United States*, 178 U. S. 304-316; 44 Law Ed. 1083."

In our opening brief, pages 115-117, we referred, at considerable length, to the leading case of *Fitzpatrick v. United States*, *supra*, and showed unquestionably that that case only involved the point as to the proper limits of the cross-examination to which a defendant subjects himself when he takes the stand. That is not the case at bar, because the defendant Caminetti was not cross-examined at all.

The case of *Powers v. United States*, 223 U. S. 303-316; 56 L. Ed. 448, cited on pages 83, 84 of the government brief, is also utterly inapplicable to the situation in the case at bar. That case, like the *Fitzpatrick* case, involved the question as to the proper limits of the cross-examination of the defendant. That is not the case at bar. No question

as to the proper limits of any cross-examination of the defendant Caminetti arises, for he was not cross-examined at all.

The case of *Sawyer v. United States*, 202 U. S. 150-168; 50 L. Ed. 979, cited on pages 84-85 of the government brief, is also utterly inapplicable to the situation in the case at bar. The question involved in that case was as to the proper limits of the cross-examination of the defendant. The Supreme Court, through Mr. Justice Peckham, held:

“It has been held in this Court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the *right to cross-examine him upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime.*” (Citing *Fitzpatrick v. United States*, 178 U. S. 304; 44 L. Ed. 1078, 20 Sup. Ct. Rep. 944.)

No such proposition or question is involved in the case at bar, for the defendant Caminetti was not cross-examined at all.

The case of *Cotton v. State*, decided by the Supreme Court of Alabama, 6 South. 372, cited on page 85 of the government brief, is also, upon the facts, utterly inapplicable to the case at bar. There, it appeared that:

“Defendant was sworn and examined on his own request, and *refused to deny* that he took the steer, or that he sold it to one Beasley.”

In his argument to the jury, the prosecuting attorney was held justified in commenting on the re-

fusal of the defendant to deny as above stated. Such a state of facts does not exist in the case at bar.

We are unable to find a case of *Graves v. State*, claimed, by counsel for the government, on page 85 of their brief, to be reported in 7 South. 317, but if it is anything like the case of *Cotton v. State*, *supra*, it is self-evident that it is inapplicable to the case at bar.

The case of *State v. Harrington*, 12 Nev. 129, relied upon by counsel for the government on pages 80-81 of their brief, is also inapplicable as to the facts, and furthermore what is there said is clearly obiter dictum.

In that case it appeared that:

“Counsel for defendant, in his argument before the jury, which preceded that of the district attorney, claimed and argued that the statements of witness Merrow were false. The district attorney in his reply, *without objection on the part of counsel for defendant or the court*, stated to the jury ‘that, inasmuch as the defendant, when testifying in his own behalf, had not contradicted the statement of Merrow, they must take said statement as absolutely true, that therefore it was true’.”

The case was reversed. The Supreme Court, in its opinion, approved of one of the very authorities cited by us in support of the point we make that error was committed by the trial Court. That authority is *People v. McGungill*, cited by us on pages 110, 133-134 of our opening brief. The Supreme

Court of Nevada, in approving of the law as declared in the case of *People v. McGungill*, said:

“In the second case (*People v. McGungill*) the defendant offered himself as a witness in his own behalf, and was only asked if he had had certain conversation with one Yates, testified to by said Yates, and he answered that he had not. *He was examined no further by his counsel than concerning such conversation, nor was he examined upon any other point, but answered all questions required of him by the court.* Upon the argument, counsel for the prosecution commented upon the fact, before the jury, that the defendant refused to be cross-examined as to the whole case. Defendant’s counsel protested against such comments, but they were continued by permission of the court. *The appellate court held that such action by the court below was error. No witness under the circumstances stated could have been cross-examined as to the whole case. If the court had compelled defendant to answer beyond the line of legitimate cross-examination, its action would have been error in a double sense; first, in allowing counsel to press in cross-examination further than is permissible in other cases; second, in compelling defendant to furnish, against his will and contrary to law, testimony for the prosecution. Defendant only claimed the rights of an ordinary witness under established rules of evidence. Counsel for the prosecution, by permission of the court, and against the rightful protest of defendant, contrary to the fact, construed a legitimate exercise of a legal right to be evidence of defendant’s guilt.*

It need not be stated that the facts of the two cases cited and the one in hand are so widely different that the former are no authority for appellant in this case.

In addition to the foregoing, it is proper to remark that it is apparent to our minds, from the bill of exceptions, that the comments of the district attorney complained of were called by those of the defendant's counsel in declaring the testimony of the witness Merrow to be false. In reply, the district attorney, to sustain the witness, and to show the truthfulness of his testimony, stated that the defendant, although he had an opportunity to do so, had not contradicted the witness. The comments, under the circumstances, were proper."

The defendant in the case at bar was not cross-examined at all, and was only asked on direct examination concerning certain conversations. In fact, the language of the Supreme Court of Nevada in the case of State v. Harrington can readily be paraphrased so as to apply to the facts of the case at bar as follows:

"He (defendant) was examined no further by his counsel than concerning such conversation, nor was he examined upon any other point, but answered all questions required of him by the court. Upon the argument, counsel for the prosecution commented upon the fact, before the jury, that the defendant refused to be cross-examined as to the whole case. Defendant's counsel protested against such comments, but they were continued by permission of the court. The appellate court held that such action by the court below was error. No witness under the circumstances stated could have been cross-examined as to the whole case. If the court had compelled defendant to answer beyond the line of legitimate cross-examination, its action would have been error in a double sense; first, in allowing counsel to press in cross-examination further than is permis-

sible in other cases; second, in compelling defendant to furnish, against his will and contrary to law, testimony for the prosecution. Defendant only claimed the rights of an ordinary witness under the established rules of evidence. Counsel for the prosecution, by permission of the court, and against the rightful protest of defendant, contrary to the fact, construed a legitimate exercise of a legal right to be evidence of defendant's guilt."

Counsel for the government claims that recent decisions by the Supreme Court of Missouri have reversed or repudiated the earlier Missouri decisions. An examination of these decisions will show that, as to the facts involved, they are utterly inapplicable to the legal situation in the case at bar, and now presented to this appellate tribunal because of the instructions of the trial Court. They involved comments of prosecuting officers, and not instructions such as are presented in the case at bar.

In the case of *State v. Raftery*, 158 S. W. 585, 587, referred to on page 103 of the government brief, it affirmatively appears that the trial Court instructed the prosecuting attorney "*not to comment on any portion of the case that he (defendant) did not testify about. I will ask the jury to disregard that statement.*" It was held, on appeal, that the rights of the defendant in that case had been fully protected by the instructions of the trial Judge to disregard the uncalled-for comments of the prosecuting officer.

In the case at bar, the trial Judge not only refused to check or reprove counsel for the govern-

ment in their comments upon the failure of the defendant to explain that or this or some other matter, which they deemed of an incriminating nature, but the trial Court, on more than one occasion, stated in the presence of the jury that he would instruct the jury in accordance with the arguments of counsel for the government.

The next case referred to by counsel for the government in their brief, on pages 103-109, is that of *State v. Larkin*, 157 S. W. 600-4. That case involved comments made by the prosecuting attorney in his argument to the jury. It certainly did not involve an instruction, such as is presented in the case at bar. It was held that the trial Court had fully protected the rights of the defendant in that case in stating:

“The court has said to stay within the record and *that should not be commented on.*”

The Supreme Court of Missouri, after an elaborate examination of the statutes of that state applicable to the rights of a defendant as a witness in his own behalf and a review of a number of authorities relating to the rights of prosecuting attorneys to comment upon the testimony given by defendant, concluded:

“That the point made by the defendant touching the comment of the prosecuting attorney, so far as the objection thereto was applicable to the facts, was *allowable*” (see page 607).

The Court also stated, on page 604:

“Leaving for a moment the broad and ever-recurring question of the right of prosecuting

attorneys to comment upon the failure of a defendant who takes the stand, to testify to facts within his knowledge, or to facts and statements attributed to him, we might say in passing that upon the record and outside of this question *there is no warrant in the testimony for the statement of the prosecuting attorney.*

* * * *In our view the chief vice in the utterance of the prosecuting attorney in this behalf arose from the fact that he was not correctly quoting what the record showed."*

The case was reversed on this and other grounds and sent back for a new trial. In view of what the Supreme Court of Missouri stated, as to the comments of the prosecuting attorney, we submit that much of its opinion is obiter dictum. Certainly the situation in that case is radically different from the one presented by the record in the case at bar. That case involved simply comments of the prosecuting officer, which the record showed were not justified, and the trial Court fully protected the rights of the defendant by instructing the prosecuting attorney:

"to stay within the record and that should not be commented on" (see page 603).

But, in the course of its opinion, the Supreme Court of Missouri concedes that the rule in the State of California is entirely different. As we have seen, the rule in the State of California is the same as that which exists in the federal Courts. In other words, "cross-examination is, in the federal Courts, limited to the matter of the direct examination, and cannot extend beyond the facts and

circumstances which are a part of or connected directly with the subject matter of the direct testimony" (language of Mr. Justice Brewer in *United States v. Mullaney*, 32 Fed. 370; see authorities set forth on pages 110-111 of our opening brief and repeated on page 15 of this reply brief).

The rule is well settled, and is thus summarized in *Cyc.*, Vol. 12, pp. 577-578:

"In those states where the accused is subject to cross-examination only as to those matters testified to on his direct examination, the prosecution *cannot comment upon his silence on cross-examination as to matters not touched upon in direct examination.*"

See, also,

Cooley Const. Lim., (6th ed.) 384-386;

State v. Lurch, 12 Oregon 99;

State v. Graves, 95 Mo. 510;

People v. O'Brien, 66 Cal. 602;

Gale v. People, 26 Mich. 157;

Fitzpatrick v. U. S., 178 U. S. 304;

Balliet v. United States, 129 Fed. Rep. 689.

As to his examination and cross-examination, the defendant stood as any other witness in the case, but he was still within the protection of the constitution, and not required to furnish evidence against himself.

It is clear that the prosecuting attorneys had no right to interrogate defendant concerning anything not relevant to his examination in chief, and for the stronger reason, the trial Judge had no right to

comment or instruct where the prosecutor could not inquire, and the jury should not have been directed to draw adverse inferences from a reserve which the law holds sacred against intrusion.

The fact, therefore, that defendant Caminetti went upon the stand and testified did not justify the instructions complained of; especially in view of the fact that he was not cross-examined at all.

All of the authorities referred to in the case of *State v. Larkin*, supra, and also referred to by counsel for the government in their brief on pages 260-261, involved, with perhaps one or two exceptions, the propriety of comments made by prosecuting attorneys in their arguments to the jury and the ever-recurring question whether the comments, under the particular and peculiar circumstances of each case, were justifiable. *In not one of those cases was the question presented of instructions to a jury such as are involved in the case at bar. Not one of those decisions or authorities upholds instructions similar to the ones presented for consideration to this appellate tribunal in the case at bar. Counsel for the government are unable to cite to this Honorable Court one single authority upholding the instructions given by Judge Van Fleet in the case at bar. The Circuit Court of Appeals, in the Balliet case, severely criticized and held to be reversible error an instruction very similar to the one presented for consideration in the case at bar. The reasoning, the logic, of the opinion rendered in the Balliet case applies, with peculiar force to in-*

structions such as were given in the case at bar. The rationale of the opinion in the Balliet case shows clearly and convincingly that such instructions as were given in the case at bar are erroneous, misleading, and indicate a hostile attitude on the part of the trial Judge.

It is with no small degree of amusement that we read the closing words of counsel for the government in their brief on this branch of the case, wherein they state:

“The Balliet case, in our judgment, does not sustain the contention of counsel. But if it should be so considered it cannot stand as against the LONG line of federal and state decisions cited by us in the preceding pages. The instruction given by the distinguished trial judge was in line with the VAST line of adjudications made by the Supreme Court of the United States and by the various states in the American Union” (see page 90 of brief of government).

The “long line of federal and state decisions cited by us (the special assistants to the attorney general) in the preceding pages” of their brief will be found to consist of twelve decisions, to all of which we have referred in the preceding pages of this reply brief, none of which involve an instruction, such as was given in the case at bar, and most of which relate to improper comments made by prosecuting attorneys, and, as we have shown, do not apply to the facts or situation involved in the case at bar at all. Not a *single federal decision* is cited by counsel for the government upholding such an

instruction as is involved in the case at bar. As we have seen, the federal cases cited by the special assistants to the attorney general in their brief, such as *Fitzpatrick v. United States*, 178 U. S. 304-316; *Powers v. United States*, 223 U. S. 303-316; *Sawyer v. United States*, 202 U. S. 150-168, do not apply at all and simply relate to the proper limits of cross-examination of a defendant.

Counsel for the government certainly drew most liberally upon their fertile imaginations when they stated, on page 90 of their brief, that:

“The instruction given by the distinguished trial judge was in line with the VAST line of adjudications made by the Supreme Court of the United States.”

As we have seen, not a single decision of the Supreme Court of the United States can be brought forward by counsel for the government, in spite of all their labor and research, approving of the instruction complained of in the case at bar. On the contrary, the only case in the federal Courts where a similar instruction was under consideration, is that of *Balliet v. United States*, in which the Circuit Court of Appeals for the Eighth Circuit unanimously declared that instructions of a similar character to those involved in the case at bar were erroneous and were misleading. The instruction in the case at bar, if not word for word the same as in the *Balliet* case, is practically the same in effect and

import, and comes within the reasons announced by the Circuit Court of Appeals in the Balliet case.

It does seem to us that had the trial judge in the case at bar charged the jury, as did Judge Pollock in the case of *United States v. Baker* (see charge fully set out on pages 76-83 of our opening brief) the ends of justice would have been fully subserved and the defendant Caminetti would have had that fair and impartial trial guaranteed to him by the Constitution and laws of the United States.

The situation of the defendant in the case of *United States v. Baker*, judging from the statements contained in Judge Pollock's charge, was somewhat similar to the position of the defendant Caminetti, in that it was claimed that there was no previous specific intent in the transportation of the young women (assuming that Caminetti did anything to transport Lola Norris, which we deny).

Judge Pollock stated to the jury, in that case:

"The defendant in this case admits he did take this girl Cora Slover at about the time charged from Peabody to St. Joseph in the State of Missouri; that is to say, that he did travel in interstate commerce. He says he was going to the City of St. Joe for the purpose of getting business in his occupation; that the girl went with him and that it was not his intention when he furnished this transportation, when he engaged in this interstate commerce with the girl, that she should engage in prostitution or debauchery, but that they were engaged to be married and expected to be married. He traveled with her to St. Joseph *and that they there lived together. If what the*

defendant says in that relation is true he is not guilty under this law, because at the time this transportation was entered upon and carried out in this state he must have knowingly furnished this transportation to this girl knowing or intending that she should become a prostitute or should engage in debauchery or such other immoral sexual practice.

Now it is the contention of the Government, and this evidence was offered to show with what mind the defendant furnished this transportation, that this defendant did at St. Joseph, Missouri, request and endeavor to induce others to engage in sexual intercourse with this woman, who is now under this testimony, his wife. Now that was offered for the purpose of showing what his mind was at the time he furnished this transportation, this intent. If he was furnishing this transportation with the intent that she should enter a house of prostitution, or should help him in any way by selling her body, to help him along, then he is guilty under this law.

If, on the contrary, he was going to St. Joseph for the purpose of looking for a position where he could ply his business and that was his honest intent, and the girl wanted to go along, as she says she did, and it was not his intent that she should engage in prostitution, debauchery or immoral practices, then he is not guilty. The burden of proving this charge beyond a reasonable doubt is on the government."

In the case at bar, it affirmatively appears, from the lips of Lola Norris and Marsha Warrington, the prosecuting witnesses themselves, that the defendant could not have had the intent ascribed to him in the indictment. The testimony of Lola

Norris herself is conclusive on this point. She testifies:

“Q. Was it not your idea and the idea of everybody to get out of Sacramento, to get out of town, and to escape the notoriety and disgrace?

The COURT. Q. Was is to get out of Sacramento or to get out of the state?

A. We didn't want to get out of the state, we thought if we could possibly stay there and avoid it we were willing to do that and face any disgrace that might come up; I don't remember that anything was said about getting out of the state. *The idea was to avoid any notoriety or scandal that might arise.*

Q. Without any particular place being mentioned?

A. No, sir.” (Transcript of Record, p. 318.)

Further on, in her direct examination, Lola Norris stated as follows:

“Mr. ROCHE. Q. Did he say anything as to what was to become of you in the event that you went away with him?

Mr. DEVLIN. Your honor, I object to that as being leading and suggestive and not asking her to give the conversation. It is suggesting to her the subject matter.

The COURT. No, he is simply calling for any statement that was made, he is not asking her to state as to any particular thing.

Mr. DEVLIN. We note an exception.

A. I don't remember just exactly what he did say about that.

Q. Was there anything said during those conversations as to any contemplated marriage between yourself and himself?

MR. DEVLIN. I object to that. The witness has answered the question. It is a very leading question.

MR. ROCHE. We have a right to call her attention to a particular subject matter now.

THE COURT. The objection is overruled.

MR. DEVLIN. We note an exception.

A. On the Saturday before we left—that was the day before, Mr. Caminetti said that his wife would start action for divorce he knew as soon as she found out that he was gone and then we would be married; but before that I don't remember Mr. Caminetti saying anything about what his wife would do." (Transcript of Record, p. 296.)

Again Lola Norris stated on her direct examination:

"No, there was nothing said as to how we were going to live." (Transcript of Record, p. 302.)

Lola Norris, on cross-examination, testified as follows:

"Mr. Caminetti did not, in any of those conversations, propose to me that I should go from Sacramento to Reno for the purpose of having sexual intercourse with him. He never did propose to me that I should go from Sacramento to Reno for the purpose of being his mistress. In any conversation where Mr. Diggs was present, I never heard him say he desired Miss Warrington to go from Sacramento to Reno for the purpose of having sexual intercourse with her. I never heard him say he desired her to go for the purpose of being his mistress. The subject of sexual intercourse or the subject of being a mistress was never discussed in any of those conversations. Never by

anybody.” (Transcript of Record, pp. 309-310.)

Marsha Warrington also testified:

“Mr. Diggs did not say to me *at any time*, that he wanted me to go over there for the purpose of living with him.” (Transcript of Record, p. 270.)

It is clear, from this testimony of the prosecuting witnesses themselves, that the intent and purpose in leaving Sacramento for Reno was one entirely inconsistent with the intent and purpose denounced by the “White slave traffic Act” and alleged in the indictment.

In the Pollock case, as in the case at bar, when the respective defendants reached their destination they lived together. But this fact alone was not conclusive of the defendants’ guilt in either case. The defendant in the case at bar was acquitted of having persuaded, enticed or induced Lola Norris or Marsha Warrington to go with him. The evidence clearly shows that the young women acted voluntarily and of their own free will and accord and desired to leave Sacramento in order to avoid the scandal and notoriety they believed to be impending and about to break forth. Here, again, the language used by Judge Pollock, in his charge to the jury in the Baker case, is instructive and, we submit, lays down the correct rules of law applicable to prosecutions under the “White slave traffic Act” where the facts presented in evidence

are such as were developed in the Baker case and the case at bar. Says the learned judge:

“The evidence is that she was really the one who wanted to go with the defendant; so then as far as the second count of the indictment is concerned there is no evidence of inducing her to accompany him. She says she wanted to go and no one induced her to accompany him. She had no place to stay and wanted to go with him; so the question after all in this case is with what purpose did the defendant furnish this transportation to this girl Cora Slover at the time it was furnished, and what was his intention in that matter at the time that he engaged in this interstate commerce. If he knowingly furnished her transportation and took this girl with him to St. Joseph for the purpose of prostitution on the part of the girl, or that she should there become through himself and others so debauched that she necessarily would become a prostitute, then the defendant is guilty and you will so find; believing the contrary, the government has failed to convince you that is true as charged in this indictment, then you will find him not guilty. Again, suppose these folks were engaged to be married; suppose he was going to St. Joseph with the legitimate purpose of engaging there in business; suppose this girl wanted to accompany him; if at the time they travelled from Peabody to St. Joseph and his motives were honest and his intentions toward the girl good; and if he did not intend that she should engage in prostitution or debauchery or other immoral acts after they got there; if that was the intention in his mind at the time he travelled; and after they got there they lived together as man and wife, that was a question for the state authorities of Missouri, and not for the federal government, because, as I have said, what constitutes adultery, what

constitutes bigamy, and what constitutes living in a state of fornication, all those questions are matters for the state. So what did this man intend? That is the question for your determination."

We respectfully submit that the views announced by Judge Pollock in the Baker case are directly applicable to the situation existing in the case at bar.

In closing our argument on this most important branch of the case, we put this question to this Honorable Court, paraphrasing the apposite language used by the Circuit Court of Appeals in the Balliet case (129 Fed. Rep. 689-696):

"Are you able to say with certainty, as you must be to uphold the verdict, that the defendant was not prejudiced by the instruction?"

III.

Answering subdivision VII of the government brief, that the prosecuting attorneys were not guilty of misconduct, prejudicial to the defendant, during their arguments to the jury, it will be noted that on pages 159-169 of their brief, counsel for the government endeavor to take refuge behind the highly technical defense that counsel for the defendant, while confessedly protesting against the improper remarks and their continued use, did not also, in every instance, ask the trial Court to instruct the jury to disregard the improper remarks.

It is quite evident that counsel for the government keenly appreciate the force of the objections and assignments of errors urged before this appellate tribunal, that they were guilty of misconduct in using the language employed by them in addressing the jury; otherwise they never would now advance the technical defense, to protect them from their confessed acts of misconduct, in urging, upon this appellate tribunal, that counsel for the defendant should have, in each instance, besides vehemently, earnestly and persistently protesting against the improper remarks, also asked the Court time and again to instruct the jury to disregard the improper remarks.

Counsel refers to certain authorities in the state Courts. Whatever the rule may be in the state Courts, such is not the rule in the federal Courts. The rights of a defendant on trial for his liberty,

in the federal Courts, are not measured by such technical considerations. As was well said by the Circuit Court of Appeals for the Eighth Circuit in the case of *Pettine v. Terr. of New Mex.*, 201 Fed. 489, 494, 497:

“In criminal cases, where the life, or as in this case the liberty, of the defendant for the probable remainder of his natural life is at stake, the Courts of the United States in the exercise of a sound discretion may notice grave errors in the trial of a defendant although the questions they present *were not properly raised in the trial Court by request, objection, or exception.*”

Citing:

Wiborg v. United States, 163 U. S. 632, 658;
16 Sup. Ct. 1127, 1197; 41 L. Ed. 289;

Clyatt v. United States, 197 U. S. 207, 221;
25 Sup. Ct. 429; 49 L. Ed. 726;

Crawford v. United States, 212 U. S. 183,
194; 29 Sup. Ct. 260; 53 L. Ed. 465; 15
Ann. Cas. 392;

Weems v. United States, 217 U. S. 349, 362;
30 Sup. Ct. 544; 54 L. Ed. 793; 19 Ann.
Cas. 705;

Williams v. United States, 158 Fed. 30, 36;
88 C. C. A. 296, 302;

Humes v. United States, 182 Fed. 485, 486;
105 C. C. A. 158, 159.

See, also,

People v. Becker, 104 N. E. Rep. 396.

But, we insist that, in the federal Courts, it is sufficient to take an exception to the remarks of the prosecuting attorney; it is sufficient to protest against his misconduct and to call the attention of the Court to the same, and if substantial injury is done to a defendant, by the taking of an exception—by the protest made at the time of misconduct—a federal appellate tribunal will notice and consider acts of misconduct on the part of prosecuting attorneys resulting in substantial injury to a defendant.

The Supreme Court of the United States, in the case of *Hall v. United States*, 150 U. S. 76, 82, said:

“The presiding judge, by declining to interpose, notwithstanding the defendant’s *protest* against this course of argument, gave the jury to understand that they might properly and lawfully be influenced by it; and thereby committed a grave error, manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of *exception*, and, *having been duly excepted to, entitled him to a new trial.*” (Citing *Wilson v. United States*, 149 U. S. 60, 67, 68.)

Furthermore, it is quite evident, from a reading of the record, as to what took place at the time of the acts of misconduct and the protests and taking of exceptions by counsel for defendant, that a request of the trial Judge that he instruct the jury to disregard the improper remarks would have been vain and superfluous. The trial Judge, in refusing to check or reprove the prosecuting attorneys, although counsel for defendant vehemently and con-

tinuously protested, objected and excepted, indicated that any request, if such be deemed necessary in federal Courts, to instruct the jury to disregard the improper remarks, would have been refused. It is but necessary to read his remarks in the record in this connection.

But, as we have already stated, it is a fundamental rule of justice in the federal appellate Courts that plain and substantial errors depriving a defendant of a fair and impartial trial will be noticed and considered, even though *no objection or exception be taken at all*.

The rule is well and compendiously stated as follows:

“An exception to the general rule that an appellate court will not consider objections first raised on appeal—exists in the case of errors apparent on the face of the record; these may be considered by the Court, though not objected to below.”

Cyc., vol. 2, p. 678, and cases there cited;
See, also, 2 Cent. Dig., title “Appeal and Error”, secs. 1145 *et seq.*;

Fuller v. Ferguson, 26 Cal. 546;

Bennett v. Butterworth, 11 How. 669, 13 L. Ed. 859;

Garland v. Davis, 4 How. 131, 11 L. Ed. 907;

Kentucky L. Ins. Co. v. Hamilton, 63 Fed. R. 93, 22 U. S. App. 586, 548, 11 C. C. A. 42.

“But where error appears in the record proper, the appellate or reviewing Court may

correct it notwithstanding that no exception was taken thereto."

Cyc., vol. 2, p. 715, and cases there cited:

2 Cent. Dig., title "Appeal and Error," sec. 1147;

Macker v. Thomas, 7 Wh. 530, L. Ed. 515.

The alleged misconduct appears in the record proper—in the bill of exceptions.

When, from the whole case, manifest injustice has been done, the appellate Court will remedy the error, notwithstanding that no objection was made.

Ringgold v. Haven, 1 Cal. 108.

When the whole record is brought up, the Court may reverse upon a defect not noticed below, *and even upon its own notice of one not pointed out by counsel.*

Garland v. Davis, 4 How. 131, 143, 11 L. Ed. 907.

If error is apparent upon any part of the record, it is open to review, whether it is found in the *bill of exceptions or elsewhere.*

Suydam v. Williamson, 20 How. 427, 15 L. Ed. 978.

The appellate Court will notice a plain error in the record, even though there be *no assignment of error.*

United States v. Pena et al., 175 U. S. 500, 44 L. Ed. 251;

Stevenson v. Barbour, 140 U. S. 48, 35 L. Ed. 338;

Rowe v. Phelps, 152 U. S. 87, 38 L. Ed. 365.

No presumption can be made in favor of the judgment of a lower Court where error is apparent in the record.

United States v. Wilkinson, 12 How. 246, 13 L. Ed. 974;

Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244.

The error appearing, as it does, on the face of the record, and being a most substantial one, involving the sacred and constitutional right of the defendant to a fair and impartial trial, will be considered by the Circuit Court of Appeals, even though *no objection* was made at the time or until after it was ascertained that the mischief had been done.

If a federal appellate tribunal, in the interests of justice, will go so far as to notice and consider acts of misconduct of prosecuting attorneys which amount to substantial errors depriving a defendant of a fair and impartial trial, although no objection or exception is taken, it certainly will consider the acts of misconduct complained of in the case at bar, where it affirmatively appears, from the record, that counsel for the defendant repeatedly and insistently, vehemently and vigorously, protested, objected and excepted to such acts of misconduct and called the attention of the trial Judge to the same and that the trial Judge refused to reprove or check the prosecuting attorneys in their acts of misconduct in making improper remarks in their arguments to the jury, and, in fact, on occasions,

approved of the improper remarks, telling the prosecuting attorneys to "proceed", or otherwise showing his approval, and, on at least two occasions, stating that he would instruct the jury in consonance with the arguments advanced by the prosecuting attorneys.

IV.

Answering Subdivision VIII of the government brief, pages 196-197, in which counsel for the government contend that:

“The trial Court committed no error in refusing the several instructions requested by the defendant, numbered 99, 100, 107, 109, 111 and 114, advising the jury that the mere presence of Caminetti without any act of participation on his part, constituted no offense”,

we append a few authorities not in our possession at the time of the writing of our opening brief.

The erroneous rulings of the trial Court, in this connection, are discussed by us on pages 249-260 of our opening brief. We there contended that some of the instructions requested on behalf of the defendant, advising the jury that mere presence by the defendant Caminetti, without any act of participation on his part, did not constitute the commission of any offense so far as he was concerned, should have been given by the trial Judge. In other words, that the defendant Caminetti was entitled to have his defense presented to the jury and submitted to them for their consideration.

We contended in the trial Court, and now maintain, that the “mere presence” of the defendant Caminetti, when the tickets were purchased by Diggs for Lola Norris, did not make him a principal or accessory, and we contended that the defendant Caminetti was entitled to have this view of his defense submitted to the jury.

As was well said by the Supreme Court of the State of California in the case of *People v. Keefer*, 65 Cal. 232:

“However incredible the testimony of defendant, he was undoubtedly entitled to an instruction based upon the hypothesis that his testimony was entirely true.”

So, in the case at bar, the defendant was entitled to some of the instructions requested by him upon the theory that his testimony was entirely true and that he did not “participate in or instigate the crime”.

In the case of *State v. Larkin*, 157 S. W. 600, the case cited by counsel for the government in support of their claim that the earlier Missouri doctrine, inhibiting comments by prosecuting attorneys upon the failure of a defendant to testify, etc., had been repudiated, it was held that “mere presence at the scene of killing without more is not such aiding, abetting, assisting, encouraging, or advising such killing as is required by law to constitute guilt” (quoting from syllabus).

In the case of *People v. Woodward*, 45 Cal. 293, the counsel for the defense asked the Court to charge the jury as follows:

“If you are satisfied from the evidence that the defendant stood by at the time the offense is alleged to have been committed, but did not act to aid, assist, or abet the same, you should find the defendant not guilty.”

“The Court refused to give the charge, and this ruling is assigned as error. We think the

charge was improperly refused. If the defendant 'did no act to aid, assist, or abet' the perpetration of the crime, he is guilty of no violation of law from the mere fact that he was present. His presence, if unexplained, would be a circumstance tending to show his complicity in the transaction. But it was for the jury to decide from all the facts proved, whether he aided, assisted, or abetted the perpetration of the offense; and if they were satisfied that though present, he did not in fact aid, assist, or abet the perpetration, it would have been their duty to acquit him. *The defendant was entitled to have the jury instructed to that effect."*

So, in the case at bar, the defendant Caminetti was entitled to have the jury instructed that although he was present when the tickets were bought, if he did not in fact aid, assist, or abet the purchaser Diggs, it was their duty to acquit him. He was at least entitled to have the jury advised as to what act or acts or conduct constituted him a principal and that mere presence at the time and place of the commission of the offense was of itself insufficient in law. It was for the jury to determine the facts and to pass upon his credibility as well as the credibility of Lola Norris and Marsha Warrington. *The defendant was entitled to have his theory of his defense submitted to the jury, under appropriate instructions from the Court.*

We cite a number of authorities strongly supporting the views we have advanced in this connection:

1 A. & E. Ency. Law, 63;

State of Mo. v. Cox, 65 Mo. 29;

Moore v. State, 111 Pac. 822;
 Ring v. State, 42 Tex. 282;
 Golden v. State, 18 Tex. App. 637;
 People v. Foley et al., 59 Mich. 553;
 People v. Woodward, 45 Cal. 293;
 People v. Ah Ping, 27 Cal. 489;
 People v. Maxwell, 24 Cal. 14;
 Lamb v. Harbaugh, 105 Cal. 680, 696;
 State v. Hildreth, 51 Am. Dec. 369;
 U. S. v. Nunnemacher, 7 Bissell, 111, 118;
 U. S. v. Goldberg, 7 Bissell, 175;
 Woolweaver v. State, 40 A. S. R. 667;
 Hicks v. U. S., 150 U. S. 442;
 Hilmes v. Stroebel, 59 Wisc. 74;
 Commonwealth v. Wilson, 186 Pa. 1;
 Plummer v. Commonwealth, 1 Bush, 76;
 Connaughty v. State, 60 Am. Dec. 370;
 U. S. v. Jones, 3 Wash. C. C. 209;
 Martin v. State, 25 Geo. 494;
 Rex. v. King, Russ. & Ry. 332, 333;
 Desty, Am. Cr. Law, Sec. 11 g.

V.

On the point that the Court erred in not instructing the jury that the girls were accomplices, Mr. Roche quotes the evidence given for the government to show that they were not accomplices, but he ignores the evidence introduced by the defendant showing that they counseled and aided the defendant. The act in which they took part was a crime—punishable by the state law, and the girls were at liberty, on bail, at the time on an accusation charging them with an offense. The law as to accomplices is based upon the theory that when two persons are implicated in an act, or a series of acts, for which both may be punished in some tribunal, and one attempts to throw all the blame upon the other, the jury should be told to view with suspicion the testimony of the person seeking to shield himself and incriminate the other. It is immaterial whether the girls could be punished under the Mann law, or under the state law. They could be punished and had been arrested for the same acts for which the defendant was being tried, and at the time of the trial in the Court below the cases against them were pending in the state Court. They had been arrested and were then being held as principals equally with the defendants Diggs and Caminetti.

VI.

As we deem that we have fully presented our views, in our opening brief, upon all the other points discussed by counsel for the government in the reply brief, we shall not further elaborate upon them in this reply brief.

Dated, San Francisco,
January 4, 1915.

Respectfully submitted,

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Of Counsel.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MAURY I. DIGGS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

No. 2404.

F. DREW CAMINETTI,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

No. 2405.

MOTION OF PLAINTIFFS IN ERROR FOR A REHEARING.

MARSHALL B. WOODWORTH,

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Attorneys for Plaintiffs in Error.

Filed this.....day of April, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

Filed

APR 16 1915

IN THE
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FOR THE NINTH CIRCUIT

MAURY I. DIGGS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

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F. DREW CAMINETTI,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

No. 2405

MOTION OF PLAINTIFFS IN ERROR FOR A
REHEARING.

Upon writs of error to the District Court of the
United States for the Northern District of California,
First Division.

PETITION FOR REHEARING.

Now come the plaintiffs in error and respectfully
petition this Honorable Court for a rehearing herein.

Inasmuch as this Honorable Court disposed of the two cases in a single opinion “for the reason that the points presented to this Court are similar in the two cases,” we present, with the permission of the Court, one petition for rehearing instead of filing separate petitions in each case, as the reasons to be urged are substantially the same in both cases.

We submit the following propositions:

1. It has been decided in two appellate jurisdictions that the instructions given by Judge Van Fleet are erroneous. The point has never been definitely settled by the Supreme Court of the United States, notwithstanding the majority opinion of this Court so states. The instructions given violated the constitutional right of the plaintiffs in error.

2. The cases cited do not support the statement of the Court that the Federal Decisions are against the contention of the plaintiffs in error, that the trial court gave to the words “concubine and mistress” too wide and inclusive a meaning.

3. Neither the law nor the evidence support the position of the majority opinion to the effect that neither Marsha Warrington nor Lola Norris could be accomplices of the plaintiffs in error, and that such a holding is in conflict with the case of *United States v. Holte*, recently decided by the Supreme Court of the United States.

4. Congress cannot, under the commerce clause of the Constitution, enact a criminal statute, the exclusive object of which is the suppression of immoral acts. That power belongs exclusively to the States.

I.

We respectfully urge that the authorities referred to by this Court do not support the doctrine declared that "where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

In this connection, we can do but little more than refer to the dissenting opinion filed in these cases in which the authorities cited in the prevailing opinion are clearly differentiated.

The attention of this Court has already been called to the fact that the Circuit Court of Appeals for the Eighth Circuit, in the case of *Balliet vs. United States*, 129 Fed. 689, has held that such a doctrine as that announced in the case at bar is erroneous, and the further attention of this Court has been called to a very recent decision of the Circuit Court

of Appeals for the First Circuit, in *Myrick vs. United States*, 219 Fed. p. 1, in which the majority of that court, Judge Putnam dissenting, followed the rule announced in *Balliet vs. United States*.

The fact, as stated by us, that none of the authorities referred to by this Court, in the majority opinion, involve or touch upon the doctrine approved by this Court, is confirmed by the majority opinion in the recent case of *Myrick vs. United States*, 219 Fed. 1, 11, where the Circuit Court of Appeals for the First Circuit states:

“This question has never been definitely decided by the Supreme Court. The cases in that court in which the question has been argued have involved the subsidiary question of the right of cross-examination under the federal rule, and have been disposed of either upon the ground that the limit to the right of cross-examination was not exceeded (*Fitzpatrick v. United States*, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078), or, if exceeded, the answers given were not prejudicial to the respondent (*Sawyer v. United States*, 202 U. S. 150, 26 Sup. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269).”

The situation in the case of *Myrick v. United States* is directly applicable to that involved in the cases at bar. Not only did the trial court permit the prosecuting officer to comment upon the fact that the defendant had not testified as to the whole case, but also instructed the jury that that omission of the

defendant could be taken into consideration in determining his guilt or innocence. We trespass again upon the time and patience of this Court, in support of this application for a rehearing, by quoting at some length from the case of *Myrick v. United States*. Circuit Judge Bingham, delivering the majority opinion, said:

“Indictments 110 and 111 were tried together (U. S. Rev. Stat. Secs. 921, 1024); and the defendant Cunningham took the stand and testified in his own behalf, confining his testimony to the source from which he obtained the information contained in the answer to question 12 (d) in the first application—that the commissions paid to agents were 33 1/3 per cent. The District Attorney, in his closing argument to the jury, said:

“There is one thing that happened in this case, gentlemen, which I submit to you, is, on the part of one of the defendants, a confession as to certain of the allegations in these indictments. Mr. Cunningham was not bound to take the stand in his own behalf. The Government could not have called him to the stand and examined him. But he chose to make himself a witness in this case. He had the opportunity offered to him by law, gentlemen, to tell you all the facts within his knowledge, and to deny every allegation which he knew or believed was not true. That was his privilege when he took the stand. He took the stand, charged with three specific wrongful acts. He took the stand, charged with having collaborated with Mr. Myrick, co-operated with him, to make the Post Office Department three false statements, bearing upon a matter of vital interest to the paper whose interests he and Mr. Myrick represented, and the

paper in whose interest their personal interests are very largely concerned. He knew—he is one of the two men in this world, gentlemen, who knows of his own knowledge—whether he conspired, whether he got together with Mr. Myrick or not to violate one of the laws of the United States. Isn't that so? He knows whether there was any understanding, expressed or implied, between them. He knew it when he took the stand. He knew whether, when he wrote that 41,200 and odd as the list of legitimate subscribers—he knew, above all other men in the world, whether that statement was true or false, and whether he knew it was true or false. He knew, as no other man in the world does know, and could tell you, whether, when he wrote the figure '6' in reply to that question as to the number of subscriptions to the paper that were paid for by others, that was true or not, whether he believed it to be true or not. And yet he was asked as to only one of those things, the least important of them all, and that was as to how he happened to write that untrue statement regarding the commissions paid for subscriptions on the first application. In other words, Cunningham knew the information which you want, and wanted, as to whether or not the statement with regard to the 41,000 was true or false; he knew whether that was written in there in accordance with Mr. Myrick's instructions a few days before, when the telegram was received; he knew whether he knew it to be false or not; he knew that he was charged with it; and yet he was not asked to tell you, and he did not tell you, that that was true; and he was not asked to tell you that he didn't know that it was not true when he wrote it. And so, too, with the statement in the second application—absolute silence—charged with a violation of the law, taking the stand in his own cause to give you information—not asked whether, when

he said '6' that was true or false, or whether he knew it to be true or false, or whether it was put there because he and Mr. Myrick had put their heads together for the purpose of getting this newspaper admitted to second class rates, and because they knew that the postal authorities had objected to that kind of subscription, but, as it appears, he deliberately wrote down something which they knew was not true. Why, gentlemen, take it in ordinary everyday life, suppose you accuse an employe of yours of an act of dishonesty, of a theft, or of a breach of duty of some kind not amounting to a crime, and you say, 'You did so and so,' or 'I *think* you did so and so,' and he stands before you absolutely silent, not admitting or denying the fact, do you have any hesitancy in believing that it is because he *can't* deny it? Is there any other reasonable explanation of his silence except that? Would you be justified in assuming that he was guilty of the charge that you made against him because of that silence alone? How much more so, in this case, where the knowledge of the truth or the falsity must have been in Cunningham's possession, as to all three of those allegations, and he is confined in his examination, and I am confined in my examination by reason of that fact, to denial of only one of them—as I said, the least important of them all."

At the close of this argument, and before the court entered upon its charge to the jury, and while there was opportunity on the part of the District Attorney to withdraw the comments which he had made with respect to the failure of the defendant Cunningham to testify to certain matters with which he stood charged in the two indictments, counsel for the defendants objected to these comments, and requested the court to deal with them in the course of his charge. The court forthwith, and before delivering his

charge, ruled 'that a defendant in a criminal case could not waive his constitutional protection piecemeal; and that the defendant Cunningham having taken the stand, and testified as to certain facts in one of the indictments, his failure to testify as to independent facts in that indictment, and as to facts in the other indictment, was the subject of legitimate comment to the jury in argument,' and declined to deal with the matter further, except as hereinafter set forth, and the defendants excepted.

In the course of his charge, the court, as to this matter, said:

'As to the defendant Cunningham, a question has come up about his evidence. Well, now, a defendant under our Constitution cannot be compelled to testify against himself. That is one of the most fundamental principles of our system of criminal law, and if he chooses to sit still nobody can criticize him for doing it. That is his right, either to sit still or to come forward and take the stand. But, gentlemen, he can't come forward, so to speak, and take the stand piecemeal. If he waives his constitutional privilege, he steps outside of the circle which the Constitution draws around him, and comes onto the stand here, he then becomes like a party in a civil case, and his failure to testify upon material points is to be considered by you exactly as you would consider the failure of a party in a civil case to give evidence that apparently lay within his knowledge upon material issues. The failure of a party to give, or to produce evidence within his knowledge or control and material to the issue, is always proper to be considered by a jury. A jury may infer from the silence upon the matter that the party considered that the evidence would not help him; but that is not a *necessary* inference. It frequently happens that lawyers inadvertently forget to ask questions,

material questions; and that ought not to count against the party, or the client, of course, if there is an unintentional omission; but an intentional failure on the part of a party to adduce evidence within his knowledge upon the points in issue, by whatever reason it is prompted, is always a very pertinent matter to be considered by a jury.'

To this portion of the charge the defendants likewise excepted.

It is thus seen that upon objection being made to the argument of the District Attorney, at a time when he could have corrected the error, if one had been committed, the court ruled that the argument was proper; 'that, the defendant Cunningham, having taken the stand and testified as to certain facts in one of the indictments, his failure to testify as to independent facts in that indictment, and as to facts in the other indictment, was the subject of legitimate comment to the jury in argument;' and that later on in his charge to the jury he confirmed his previous ruling, when he stated that it was the right of the accused 'either to sit still or come forward and take the stand,' but if he did come forward he could not do so 'and take the stand piecemeal'; that he waived his constitutional privilege if he stepped outside of the circle which the Constitution drew around him by coming upon the stand the same as a party would in a civil case.

It cannot reasonably be said that the objection and exception to the argument and the ruling thereon were not seasonably and properly taken, or that the exception to the charge was not sufficiently specific to appraise the court of the ground of the objection. The record discloses that the court fully understood what the nature of the objection was upon which the defendants relied. This appears from what took place at the close of the argument of the District Attorney when this matter was without doubt fully

discussed, and the definite and explicit ruling of the court was made. The question is therefore presented whether a defendant, when set to the bar for trial before a jury upon two indictments charging different offenses, by taking the stand and limiting his testimony to a particular charge in one of the indictments, waives his constitutional right with reference to the charge contained in the other indictment, so that inferences may be drawn against him from his failure to testify as to any of the matters there charged. It seems to us that to state the question is to answer it; that it was not the intention of Congress, in the enactment of the law authorizing the trial of an accused person for distinct offenses, at the same time, on two or more indictments, to deprive him of his constitutional right not to have inferences drawn against him by reason of his failure to testify upon one indictment, should he see fit to testify to matters charged in the other indictment; and that this is especially true where the indictments are not consolidated by an order of the court, as they were not in this case, but were tried as independent and distinct matters, though before the same jury. *Betts v. United States*, 132 Fed. 228, 229, 230, 234, 235, 65 C. C. A. 452.

The exception taken to the ruling of the court made in answer to the objection of counsel to the argument of the District Attorney also presents the question whether, the defendant Cunningham having taken the stand and testified to certain facts in the first indictment, his failure to testify as to independent facts in that indictment was the subject of legitimate comment by the District Attorney in his argument.

This question has never been definitely decided by the Supreme Court. The cases in that court in which the question has been argued have involved the subsidiary question of the right of

cross-examination under the federal rule, and have been disposed of either upon the ground that the limit to the right of cross-examination was not exceeded (*Fitzpatrick v. United States*, 178 U. S. 304, 20 Sup. Ct. 944, 44 K. Ed. 1078), or, if exceeded, the answers given were not prejudicial to the respondent (*Sawyer v. United States*, 202 U. S. 150, 26 Sup. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269). In *Balliet v. United States*, 129 Fed. 689, 695, 64 C. C. A. 201, decided in the Eighth Circuit, the defendant excepted to the following statement of the trial judge in his charge to the jury:

‘It has been suggested that I have overlooked one thing. I may say you may consider, in determining the question, the fact that the defendant having gone upon the witness stand, if he has not fully explained, or has not explained matters which are material to the issues in this case, and which are naturally within his knowledge, you may consider that as a circumstance tending to show that the facts, if explained, etc., would bear out the contention of the government, and his failure to explain them or give a truthful explanation is against him.’

And the court, in commenting upon the charge, said:

‘We have not been able to conclude that this instruction states a correct rule of law, or that the giving of it was not a material error.’

This instruction, which was held to be erroneous, did not differ materially from the one given in the case under consideration. The court, after discussing the matter at some length, without reaching any definite conclusion, then assumed that, if the defendant, upon taking the stand, waived his right not to have inferences drawn against him for failure to testify as to material matters, nevertheless the instruction in question gave too great latitude to the jury, and

subjected the defendant to too great a burden in that 'it left the jury to determine what matters which had been given in evidence were "material to the issues in the case",' without directions on that point, and gave 'equal liberty to determine what matters were "naturally within his knowledge" and susceptible of explanation.'

Judge Sanborn concurred in the result reached in that case, but, it would seem, upon vitally different grounds. He took the position that the right of cross-examination in the federal court was limited strictly to subjects inquired of in direct examination; that circumstances might arise under which the court, in the exercise of its discretion, might permit the examiner to inquire as to matters which had not been taken up in direct examination; but that this was not cross-examination, and, in doing so, the examiner made the witness his own. He fails, however, to state the conclusion which he intended should be drawn from this view of the matter. But it is evident that he entertained the opinion that, as applied to the case then under consideration, the defendant, by taking the stand, did not waive his constitutional right to be free from unfavorable comment, except as to matters to which his direct testimony particularly related, and that as to other matters he did not waive his privilege, and did not subject himself to unfavorable comment in this respect, if he declined or failed to testify as to them. And this is the view entertained by Judge Cooley. Cooley's Constitutional Limitations (3rd Ed.) p. 317, note. In some jurisdictions, where the right of cross-examination is unlimited, it is held that a defendant, by taking the stand in a criminal case, waives his right not to have unfavorable inferences drawn against him, if he fails to testify to any material matter. *State v. Ober*, 52 N. H. 459, 13 Ann. Rep. 88; *Commonwealth v. Smith*, 163 Mass. 411, 431, 40

N. E. 189; *People v. Tice*, 131 N. Y. 651, 655, 30 N. E. 494, 15 L. R. A. 669; *Commonwealth v. Morgan*, 107 Mass. 199, 205; *Commonwealth v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346; *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688; *State v. Williams*, 72 Me. 531. And in jurisdictions where the right of cross-examination is restricted to matters inquired of in chief, that he does not. *People v. McGungill*, 41 Cal. 429; *People v. Sanders*, 114 Cal. 216, 238, 46 Pac. 153; *State v. Elmer*, 115 Mo. 401, 22 S. W. 369; *State v. Lurch*, 12 Or. 99, 6 Pac. 408. It would seem that the courts, in reaching these conclusions, have been largely influenced by the rule existing in the different jurisdictions as to cross-examination—that if the right were unlimited the accused, by taking the stand under such circumstances, would waive his privilege—but, if it were limited to subjects inquired of on direct examination, his privilege would be waived only to that extent, as he had no reason to understand that his conduct would impose a greater burden. We understand the rule in the federal courts as to cross-examination to be as stated by Judge Sanborn in the *Balliet Case*, and are of the opinion that the defendant *Cunningham*, by taking the stand and testifying as to the commissions paid to agents, did not waive his constitutional right to be free from unfavorable comment on matters to which his testimony did not relate, and as to which he said nothing.”

We respectfully submit that the line of demarcation, pointed out by the Circuit Court of Appeals for the First Circuit in the case of *Myrick vs. United States*, *supra*, in explaining what otherwise would seem to be an irreconcilable conflict between the decisions in this country upon the question of the right

of a prosecuting attorney to comment and of the trial court to instruct upon the failure of a defendant to explain or deny matters not elicited from him either on direct or cross-examination, is logical and reasonable and explains this apparent conflict of authority. As stated by that court, in some jurisdictions, where the right of cross-examination is unlimited, it is held that a defendant, by taking the stand in a criminal case, waives his right not to have unfavorable inferences drawn against him, if he fails to testify to any material matter, and in other jurisdictions, where the right of cross-examination is restricted to matters inquired of in chief, that he does not; and the Circuit Court of Appeals for the First Circuit points out that in the federal courts the cross-examination is limited to matters inquired of in chief, a rule of evidence as to which there is not the slightest doubt. As stated by Mr. Justice Brewer in *United States v. Mullaney*, 32 Fed. 370:

“Of course, cross-examination is, in the Federal courts, limited to the matter of the direct examination, and cannot extend beyond the facts and circumstances which are a part of or connected directly with the subject matter of the direct testimony.”

And the general rule is thus epitomized in 12 CYC., pp. 577, 578, as follows:

“In those states where the accused is subject to cross-examination only as to those matters

testified to on his direct examination, the prosecution cannot comment upon his silence on cross-examination as to matters not touched upon in direct examination."

We respectfully submit that the well settled rule, existing in the Federal courts (and in certain of the states), that cross-examination must be limited to the matters elicited upon direct examination, would be abolished if the doctrine announced by this Honorable Court is admitted to be correct. Hundreds upon hundreds of cases—civil as well as criminal—have been reversed by the Federal Appellate tribunals because cross-examination was permitted by the trial court to extend beyond matters covered by the direct examination. It seems to us axiomatic in criminal cases that if a prosecuting attorney is not permitted to cross-examine a defendant upon matters not covered by his direct examination, he certainly should not be permitted to comment upon matters which the law holds sacred from intrusion, and if the prosecuting attorney has no right to make such comments, the trial court is equally without the right of commenting or instructing the jury with reference to the testimony of a defendant and telling them that:

"It is a legitimate inference that could he have truthfully denied or explained the incriminating evidence against him he would have done so,"

as was done in the cases at bar.

II.

We desire to call attention to the fact that the cases cited, with perhaps one or two exceptions, do not support the view, announced by this Court in the majority opinion, that "the Federal decisions are against these contentions," referring to the contentions advanced, in behalf of the plaintiffs in error, "that the (trial) Court in its instructions gave to the word 'concubine' and 'mistress' too wide and inclusive a meaning, and it is argued that the defendants by transporting the women for the purpose of making them their concubines and mistresses were not guilty of the offense defined in the Act, and that the words 'prostitution or debauchery, or any other immoral practice, do not include concubinage, and that the immorality denounced by the White-Slave Traffic Act is only commercialized vice." (See Opinion of Hon. William B. Gilbert.)

The first case cited by this Court in support of its statement, contained in the majority opinion, that "the Federal decisions are against these contentions," is the case of *Hoke v. United States*, 227 U. S. 308. That case was one involving commercialized vice. The indictment in the *Hoke* case charged that the transportation was "for the purpose of prostitution," whereas, in the case at bar, there is no such allegation or pretense.

The next case cited by this Court is that of *Athanasaw v. United States*, 227 U. S. 326. It affirmatively appears that that also was a case of commercialized vice. The girl in that case was transported for "the purpose of debauchery," as the indictment there alleged. She was to "get all the money I (she) could get out of them," a clear case of commercialized vice.

The next case cited by this Court is that of *United States v. Bitty*, 208 U. S. 393. That decision did not involve a consideration of the purpose and scope of the "White-slave Traffic Act."

The next case cited by this Court is that of *United States v. Flaspoller*, 205 Fed. 1006. That decision is by the District Court for the Eastern District of Louisiana and supports the view taken by this Court as to the meaning of the words "any other immoral purpose." It does not appear to us to be a well measured or considered decision.

The next case cited by this Court is that of *Johnson v. United States*, 215 Fed. 679. That case also supports the views announced by this Court. But it is interesting to note that the dissenting opinion of Mr. Justice Lamar, concurred in by Mr. Justice Day in the case of the *United States v. Clara Holte*, recently decided by the Supreme Court of the United States, is opposed to the views announced by the Circuit

Court of Appeals for the Seventh Circuit in the case of *Johnson v. United States*.

In the latter case, the Circuit Court of Appeals for the Seventh Circuit, in holding that the words "other immoral purpose" included "unlawful sexual intercourse regardless of financial considerations," declares:

"So it becomes apparent that 'commercialized vice' or 'the traffic in women for gain' is not the common ground, that the nexus indicative of the genus is sexual immorality, and that *fornication* and *adultery* are species of that genus." (See 215 Fed. Rep. 679, 683.)

Mr. Justice Lamar, in dissenting opinion, gives vent to views that are opposed to those declared by the Circuit Court of Appeals in the *Johnson* case. We quote from the dissenting opinion as follows:

"Congress had no power to punish immorality and certainly did not intend by this act of June 25, 1910, (35 Stat. 825) to make fornication or adultery, which was a state misdemeanor, a federal felony punishable by \$5,000 fine and five years' imprisonment. But when it appeared that there was a traffic in women to be used for purposes of prostitution, debauchery and immoral purposes, Congress legislated so as to prohibit their interstate transportation in such vicious business. That there was such traffic in women and girls; that they were 'literally slaves,' 'owned and held as property and chattels,' and that their traffickers made large profits, is set out at length in the Reports of the House and

Senate Committees (61st Congress, 2nd Session) recommending the passage of the bill. So that an argument based on the use of the words 'slave,' 'enslaved,' 'traffic in women,' 'business in women,' 'subject of transportation,' and the like—which otherwise appear to be strained,? is amply justified by the amazing facts which those reports show as to the existence and extent of the business and the profits made by the traffickers in women. The argument based on the use of these words, and what they imply, is further justified by the fact that the statute itself declares (Sec. 8) that it shall be known as the 'White Slave Traffic Act.' In giving itself such a title the statute specifically indicates that, while of right, woman is not an object of merchandise or traffic, yet for gain she has by some been wrongfully made such for purposes of prostitution—and that trade Congress intended to bar from interstate commerce.

"The Act either applies to women who are willingly transported or it does not. If it does not apply to those who willingly go (47 H. R. 61st Cong., 2nd Session, p. 10) then there was no offense by the man who transported her or in the woman who voluntarily went,—and, in that event there was, of course, no conspiracy against the laws of the United States in her agreeing to go. The indictment here, however, assumes that the Act applies not only to those who are induced to go, but also to those who aid the panderer in securing their own transportation. On that assumption, every woman transported for the purposes of the business stands on the same footing and cannot by her consent change her legal status. And if she cannot be directly punished for being transported, she cannot be indirectly punished by calling her assistance in the transportation a conspiracy to violate the laws of the United States. For if she is within the circle of

the statute's protection she cannot be taken out of that circle by the law of conspiracy and thus be subjected to punishment because she agreed to go.

“The statute does not deal with the offense of *fornication and adultery*, but treats the woman who is transported for use in the business of prostitution as a victim—often a willing victim but nevertheless a victim. It treats her as enslaved and seeks to guard her against herself as well as against her slaver; against the wiles and threats, the compulsion and inducements, of those who treat her as though she was merchandise and a subject of interstate transportation. The woman, whether coerced or induced, whether willingly or unwillingly transported for purposes of prostitution, debauchery and immorality, is regarded as the victim of the trafficker and she cannot therefore be punished for being enslaved nor for consenting and agreeing to be transported by him for purposes of such business. To hold otherwise would make the law of conspiracy a sword with which to punish those whom the Traffic Act was intended to protect.”

In view of these expressions of opinion by two members of the Supreme Court of the United States, we invite a reconsideration of the question as to the true purpose and scope of the “White-slave Traffic Act.” Of course, the prevailing opinion shows that the Supreme Court considered that case as one of prostitution—one of commercialized vice. The indictment in that case was one

“for a conspiracy between the present defendant and one Laudenschleger that Laudenschleger should cause the defendant to be transported

from Illinois to Wisconsin for the purpose of prostitution, contrary to the Act of June 25, 1910, c. 396; 36 Stat. 825."

It is true that the prevailing opinion states:

"We do not have to consider what would be necessary to constitute the substantive crime under the Act of 1910, or what evidence would be required to convict a woman under an indictment like this; but only to decide whether it is impossible for the transported woman to be guilty of a crime in conspiring as alleged."

The Supreme Court, in the prevailing opinion, took the view that the woman may not always be the victim and if her conduct, in submitting to transportation for the unlawful purpose is voluntary—if she goes willingly—she is equally guilty with the person transporting her and may be indicted for a conspiracy to violate the "White-slave Traffic Act." The dissenting opinion takes the view that the woman, transported, whether willing or unwilling to be transported, is always to be regarded as the victim. But these opinions, we respectfully submit, both prevailing and dissenting, make it clear that the Supreme Court of the United States regards the "White-slave Traffic Act" as limited in its purpose, scope and operation to cases of commercialized vice and not to mere cases of fornication or adultery such as are the cases at bar.

III.

It is respectfully submitted that the position taken by the majority opinion in holding that neither Marsha Warrington nor Lola Norris could be accomplices of the plaintiffs in error is not supported by law or by the evidence contained in the transcript of record.

The question as to whether or not they were accomplices was one for the jury to determine under appropriate instructions from the trial court. But the trial court took upon itself to determine that they were not accomplices, a function and question of fact which belonged exclusively to the jury. We feel that this Court, in its majority opinion, has fallen into the same error.

If Marsha Warrington and Lola Norris, or either of them, went voluntarily and willingly with the plaintiffs in error on the foolish and reprehensible trip from Sacramento to Reno they were not victims but were willing accomplices.

This is distinctly recognized in the case of *United States v. Clara Holte*, a very recent decision in the Supreme Court of the United States. The Supreme Court even went so far, in that case, as to hold that a woman willingly consenting to be transported for the purpose of prostitution, contrary to the Act of June

25, 1910, c. 396, 36 Stat. 825 (the "White-slave Traffic Act") is a co-conspirator with the person furnishing the transportation and can be indicted with such person for a conspiracy to commit an offense against the United States. If the woman willingly consenting to be transported for any of the purposes denounced by the "White-slave Traffic Act" is so culpable as to be capable of being indicted as a co-conspirator, then most certainly she is an accomplice and it was error for the trial court to take that question of fact from the jury and to refuse to instruct the jury with reference to that subject as requested by the attorneys for the plaintiffs in error. As stated by the Supreme Court in the case of *United States v. Clara Holte*, supra, "if we abandon the illusion that the woman always is the victim," Marsha Warrington and Lola Norris certainly were accomplices of the plaintiffs in error, for they knowingly and voluntarily, and with common intent with the principal offender, united in the commission of an offense.

United States v. Ybanez, 53 Fed. 536, 540.

It affirmatively appears in evidence that at the time of the trial of these cases both of the girls had been arrested along with the plaintiffs in error by the State authorities for violations of the State laws arising out of the trip from Sacramento to Reno, and that their cases were then pending and that they were out

on bail. Their complicity was such that they had been arrested with the plaintiffs in error for violations of the State laws. They were equally guilty of complicity with the plaintiffs in error in the violations of those provisions of the "White-slave Traffic Act" upon which both of the plaintiffs in error were convicted.

We cannot assent to the doctrine that a witness may be an accomplice as to one thing in a case and not an accomplice as to another. This Honorable Court held:

"We are of the opinion that as to the counts of the indictments on which the defendants were found guilty neither Marsha Warrington nor Lola Norris was an accomplice, for while there was testimony which, if credited, Marsha Warrington might have been deemed an accomplice of the defendants in persuading, inducing and enticing Lola Norris to go to Reno, under the last two counts of the indictments that question is eliminated from the case by the verdict of the jury in acquitting each of the defendants on those counts."

If Marsha Warrington was an accomplice, or could be deemed an accomplice, as to some one feature of the case, we submit that she was an accomplice as to every other feature of the case.

Under the recent decision of the Supreme Court in *United States v. Clara Holte*, both were accomplices. At any rate, there was sufficient evidence on the part

of the plaintiffs in error to justify and require the trial court to submit to the jury, as a question of fact, whether or not Marsha Warrington and Lola Norris, or either of them, were accomplices with the plaintiffs in error and if the jury should so determine that the testimony of an accomplice should be received with caution and weighed and scrutinized with great care by the jury, and that the jury should not regard the testimony of an accomplice unless she is confirmed and corroborated in some material parts of her evidence.

IV.

Neither the majority nor minority opinions mention the most vital point raised in these cases—the point which strikes at the right of the lower Court to entertain them—to hear and determine the charges made—the jurisdiction of the Court below over the subject matter involved.

This question has never before been presented in a simon pure form in any case.

The point was raised in the Johnson case (215 Fed. 683), but Judge Baker treated it lightly and gave it but a very superficial consideration.

In the lottery cases (188 U. S. 321) we find the nearest approach to it; but, as we will show hereafter, that case was decided on another ground. However, the point was so closely approached in that case that it divided the Supreme Court—five to four.

The point contended is this: Can Congress, under the commerce clause of the Constitution, enact a criminal statute the *exclusive* object of which seeks the suppression of immoral acts. In other words, can the commerce clause be stretched by construction to cover immorality when no subject of traffic is involved?

We say, *No!* most emphatically, *No!*

This phase of the question was ignored in the Johnson case—the only case in which it has been raised other than the lottery cases. The Johnson case was a hard case; it is a legal maxim, that: “Hard cases make bad precedents.”

But, it will be said, the traffic question *is* involved. The traffic question is *not* involved.

“Traffic” does not mean “transportation.” The two words are not synonymous. In reading the act of June 25th, 1910, these words should be given their individual meanings.

Right here, we wish to say that we are in accord with all the Federal decisions construing Congressional jurisdiction under the commerce clause of the Constitution. We are in harmony with the *conclusions* reached in each of these many decisions, except the Flaspoller case upon which we will comment hereafter.

The only criticism we would have this Court understand that we are advancing is the route selected by the Seventh Circuit to arrive at its conclusion in the Johnson case.

Judge Baker, in subdivision 4 of his opinion (215 Fed. 683-4), says:

“4. Lawful power in Congress to pass an act of this scope is challenged. There was a time

when it would have been interesting to examine the contention that the word 'commerce' in the commerce clause of the Constitution means only 'traffic in or an exchange of commodities.' But when the ultimate tribunal long ago definitely decided that the term also includes 'navigation and intercourse,' that 'transportation of persons' in and of itself is 'commerce,' and that 'commerce' may not only be 'regulated,' but actually prohibited, in the interest of the general welfare, no room was left for profitable discussion."

The Seventh Circuit failed to see either the fallacy of this holding or the inapplicability of the authority cited.

In this connection we respectfully refer the Court to pages 264-268 and 279-331 of our Opening Brief in the Diggs case herein.

Let us briefly review the cases cited by Judge Baker (215 Fed. 684):

The passenger cases (7 How. 283) decided that a State was without jurisdiction to regulate foreign passenger traffic. The subject matter of the action was *passenger traffic*, the regulation of the person dealing in human beings for a monetary consideration—carrying people from place to place for hire—a species of commerce. The carrying traffic.

The Gloucester ferry case (114 U. S. 196) deals with the same subject. The 9th Syllabus is the key to its subject matter:

“The transportation of passengers and freight for hire by a steam ferry across the Delaware River from New Jersey to Philadelphia by a corporation of New Jersey is inter-state commerce, which is not subject to exactions by the State of Pennsylvania.”

The subject of the Covington case (154 U. S. 204) is discerned in this quotation taken from the first portion of the syllabus:

“* * * ; and the eighth section declared that ‘the president and directors shall have the right to fix the rates of toll for passing over said bridge, and to collect the same from all and every person passing thereon, with their goods, carriages, or animals of every description or kind;
* * *”

The Rohrer case (140 U. S. 545) is the Original Package case. The Supreme Court in that case had under consideration the traffic in liquors—a commercial product—and held that the same when delivered in a State was so delivered subject to the State police regulations. This was an interstate regulation of a traffic in a commercial commodity.

The Supreme Court construed the Federal jurisdiction to regulate the commercial interstate pursuit of dealing in iron pipe when such traffic involved private contracts in restraint of trade in the Addyston pipe case (175 U. S. 211).

As we said before, in the lottery cases (188 U. S. 231), we have incidentally involved, but *not* decided,

the question we are here advocating. Those cases were decided on the question of traffic—the dealing in tickets for money. Had the case involved solely the question of the suppression of the evils of the lottery, were such possible, another result would have been reached. In that case (p. 345) Mr. Justice Harlan, who wrote the majority opinion, thus defines “commerce,” both in its general meaning and also as applied by him to that case:

“What is the import of the word ‘commerce’ as used in the Constitution? It is not defined by that instrument. Undoubtedly, the carrying from one State to another by independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several States include something more? Does not the carrying from one State to another, by independent carriers, of lottery tickets that entitle the holder to the payment of a certain amount of money therein specified also constitute commerce among the States?”

Again, on page 353, he says:

“These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn.”

From these extracts alone, it is seen beyond a peradventure of a question that the Federal jurisdiction in the lottery cases was sustained solely upon the

monetary view-point and not upon the immorality phase of the subject matter. A reading of Mr. Justice Fuller's dissenting opinion in the case is instructive.

When we read Mr. Justice McKenna's opinions in the Hoke and Athanasaw cases, we must do so remembering that those were white-slave cases proper. The defendants were found guilty of trafficking in women for gain. The crime of which they were found guilty was the unlawful dealing in women for a monetary consideration. The women were the lottery tickets. By means of the women the defendants expected to make money. They were a species of merchandise. In the Holt case, the woman made her master's money in a house of prostitution. In the Athanasaw case, the woman was to be what is vulgarly known as a "box rustler" in a low variety theatre. Her masters expected to make money out of her sales of liquors to men in a dive. The case being covered by that portion of the statute reading, "or other immoral purpose."

In none of the last three mentioned cases does the regulation of the common carrier feature appear, nor is it an element of the subject matter. Neither the railway company nor the express company is involved in the wrong sought to be punished. In the cases involving the questions purely of transportation of

freight or passengers, the common carrier is the person regulated, not the shipper nor the passenger, as the carrier is, in such cases, the trafficker.

In the instant case, the defendants were not trafficking in these women when they bought the tickets for their passage. They were not making money out of them in so transporting them to Reno. They were not carriers of passengers subject to interstate regulation. They were not engaged in ferrying passengers across the Delaware or exacting tolls for crossing a bridge over the Ohio at Cincinnati. Neither were the women in any sense the subjects of traffic in interstate commerce. They cannot be likened to the packages of liquors—the iron pipe—the lottery tickets—all a specie of trade. They cannot be likened to the women in the Hoke or Athanasaw cases—these defendants were not to use them for the purpose of making money. They were not engaged in any interstate commercial pursuit when they transported them.

When Congress passes a law making it a criminal offense for a common carrier to transport lewd women in inter-state travel, the transporting feature will be lawfully regulated. But until Congress so acts the mere transport feature is not a criminal offense. For instance: Anyone can procure a ticket for a woman whom he knows intends to use it to

travel to another State for the express purpose of engaging in prostitution. Such act would not be indictable under the Mann Act. Why? Simply because there is no commercial feature connected with the act. There is no traffic.

Admitting, for the argument, that every fact in these cases was proven: There is no commercial feature involved. No traffic for a money consideration. No transportation in interstate trade. No question of the regulation of a carrier of passengers nor of a shipper of a commercial subject.

The lottery cases (*supra*), with the monetary feature of the tickets eliminated, are on all fours. With the traffic for a money consideration thus excluded, can Congress regulate purely immoral conduct?

The Federal jurisdiction in *U. S. v. Bitty*, 208 U. S. 393, did not fall under the commerce clause, so the case is not in point. (See our Opening Brief in the *Diggs* case, pp. 308-9.)

U. S. v. Flaspoller, 205 Fed. 1006, is not a well considered case. Judge Foster failed to distinguish the difference between Federal jurisdiction over immigration and Federal jurisdiction granted under the commerce clause. He also failed to note the difference in meaning between "traffic" and "transport."

Upon the other numerous assignments of error, to

which this Court has given its careful consideration, we can do no more than iterate the views expressed by us in our briefs already on file.

We appreciate that the members of this Court have given to these plaintiffs in error most patient, considerate and able consideration of the many vexed and important questions presented, but in view of the fact that the opinion of the Court is not unanimous and that, perhaps, we have not made ourselves as clear as we otherwise should in the advocacy of our various and numerous grounds for a reversal of the judgments of conviction, we respectfully ask this Court to grant a re-hearing herein for the foregoing reasons.

Respectfully submitted,
MARSHALL B. WOODWORTH,
ROBERT T. DEVLIN,
Attorneys for Plaintiffs in Error.

United States of America,
Northern District of California.

I, Marshall B. Woodworth, one of the attorneys for the plaintiffs in error hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for the purposes of delay.

MARSHALL B. WOODWORTH,
One of the Attorneys for Plaintiffs
in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. H. NELSON,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

Filed

JUL - 1 1914

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,
Plaintiff in Error,

VS.

A. H. NELSON,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Affidavit, Acknowledgment, and Justification by Guaranty or Surety Company.....	67
Answer	23
Answer to Supplemental Complaint	48
Assignment of Errors..	58
Attorneys, Names and Addresses of.....	1
Bill of Exceptions.....	54
Bond on Removal.....	18
Bond on Writ of Error.....	65
Certificate of Clerk U. S. District Court to Judgment and Judgment-roll.....	53
Certificate of Clerk U. S. District Court to Tran- script of Record.....	69
Citation on Writ of Error (Original).....	3
Complaint.....	7
Complaint, Supplemental.....	30
Demurrer to Supplemental Complaint.....	45
Exception I.....	55
Exception II.....	55
Exception III.....	56
Exception IV.....	56
Judgment.....	51
Names and Addresses of Attorneys.....	1

Index.	Page
Notice of Motion for Leave to File Supplemental Complaint	29
Notice of Petition for Removal, etc.	14
Order Allowing Writ of Error.	63
Order Enlarging Time to May 1, 1914, to File Record Thereof and to Docket Cause in Appellate Court.	71
Order for Removal.	21
Order Granting Motion for Leave to File a Supplemental Complaint, etc.	27
Order Overruling Demurrer to Supplemental Complaint, etc.	46
Order Settling, and Allowing Bill of Exceptions.	57
Order Staying Proceedings	64
Petition for Removal	15
Petition for Writ of Error.	61
Stipulation as to Bill of Exceptions.	57
Summons	5
Supplemental Complaint	30
Verdict	50
Writ of Error (Original).	1

Names and Addresses of Attorneys.

For Plaintiff in Error, The Atchison, Topeka and Santa Fe Railway Company, a Corporation:

E. W. CAMP, A. H. VAN COTT, U. T. CLOTFELTER, M. W. REED, and PAUL BURKS, Esq., 409 Kerckhoff Building, Los Angeles, California.

For Defendant in Error, A. H. Nelson:

Messrs. FLINT, GRAY & BARKER, 1027 Title Insurance Building, Los Angeles, California. [3*]

[Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to The Honorable the Judge of the District Court of the United States for the Southern District of California, Greeting:

Because in the record of proceedings, and also in the rendition of the judgment of a plea which is in the said District Court before you, between The Atchison, Topeka and Santa Fe Railway Company, plaintiff in error, and A. H. Nelson, defendant in error, a manifest error hath happened to the great damage of the plaintiff in error, The Atchison, Topeka and Santa Fe Railway Company, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and

*Page-number appearing at foot of page of original certified Record.

full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, and then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 17th day of March, next, in the Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid be inspected, the said United States Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Justice of the United States, this 17th day of February, in the year of our Lord one thousand nine hundred and [4] fourteen and of the Independence of the United States, the one hundred and thirty-eighth.

[Seal]

WM. M. VAN DYKE,
Clerk of the District Court of the United States of
America for the Southern District of California.

By Chas. N. Williams,
Deputy Clerk.

The above writ of error is hereby allowed.

OLIN WELLBORN,
Judge. [5]

I hereby certify that a copy of the within Writ of Error was on the 17th day of February, 1914, lodged in the Clerk's Office of the said United States Dis-

trict Court for the Southern District of California,
Southern Division, for the said defendant in error.

WM. M. VAN DYKE,
Clerk United States District Court, Southern Dis-
trict of California.

By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: Original. No. 228—Civil. Dept.
——. In the District Court of the United States,
Sou. Dist. of Calif., Southern Division. A. H. Nel-
son, Plaintiff, vs. The Atchison, Topeka and Santa
Fe Railway Company, Defendant. Writ of Error.
Filed February 17, 1914, Wm. M. Van Dyke, Clerk.
By C. E. Scott, Deputy Clerk. [6]

[Citation on Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

To A. H. Nelson, Greeting:

You are hereby cited and admonished to be and
appear at a United States Circuit Court of Appeals
for the Ninth District, to be held at the City of San
Francisco, in the State of California, on the 17th
day of March, A. D. 1914, pursuant to a writ of error
on file in the Clerk's office of the District Court of
the United States, for the Southern District of Cali-
fornia, in that certain action No. 228 Civil, wherein
The Atchison, Topeka and Santa Fe Railway Com-
pany is plaintiff in error, and you are defendant in
error, to show cause if any there be why the judg-
ment given, made and rendered against the said The
Atchison, Topeka and Santa Fe Railway Company

in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable OLIN WELLBORN, United States District Judge, for the Southern District of California, this 19th day of February, A. D. 1914, and of the Independence of the United States, the one hundred and thirty-eighth.

OLIN WELLBORN,
U. S. District Judge for the Southern District of
California. [7]

[Endorsed]: Original. No. 228—Civil. Dept.—
In the United States Circuit Court of Appeals for
the Ninth Circuit. The Atchison, Topeka and Santa
Fe Railway Company, Plaintiff in Error, vs. A. H.
Nelson, Defendant in Error. Citation. Filed Feb.
20, 1914. Wm. M. Van Dyke, Clerk. By Chas. N.
Williams, Deputy Clerk.

Received copy of the within Citation this 19 day
of February, 1914.

FLINT, GRAY & BARKER,
By WHEATON A. GRAY,
Attorney for Defendant in Error. [8]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. 228—Civil.

A. H. NELSON,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,
Defendant. [9]

[Summons.]

*In the Superior Court of the State of California, in
and for the County of San Bernardino.*

A. H. NELSON,

Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAIL-
WAY COMPANY, a Corporation,
Defendant.

Action brought in the Superior Court of the State of California, in and for the County of San Bernardino, and the Complaint filed in said County of San Bernardino, in the Office of the Clerk of said Superior Court.

The People of the State of California Send Greetings to Atchison, Topeka & Santa Fe Railway Company, a Corporation, Defendant.

YOU ARE HEREBY DIRECTED TO APPEAR and answer the Complaint in an action entitled as above, brought against you in the Superior

said plaintiff and his said wife living with said plaintiff and his said wife and under their care in the said home, to wit:

Harold A. Nelson, a son of plaintiff and his said wife, 23 years of age; Leslie S. Nelson, a son of plaintiff and his said wife, 14 years of age; Roy Nelson, a son of plaintiff and his said wife, 13 years of age; Helen Nelson, a daughter of plaintiff and his said wife, 10 years of age; Donald Nelson, a son of said plaintiff and his said wife, 8 years of age.

III.

That prior to the injuries received by plaintiff's said wife as hereinafter stated, plaintiff's said wife was at all times in excellent health, strong and able to work and did work continuously in and about the home of plaintiff and his said wife, and at all said times prior to her injury was able to and did do all the housework and cooking in said home, not only for this plaintiff and said family of children but also for the men hired by plaintiff upon the said ranch. Plaintiff's said wife also assisted him at all times prior to her said injuries in the care and management of their said children and in the conduct and management of the household affairs of said plaintiff. At the time of the injuries to plaintiff's said wife she was 46 years of age, well skilled in all kinds of housework, cooking and in the care of a home and family.

IV.

That on the 15th day of June, 1912, plaintiff purchased tickets from the ticket agent of the defendant company and there was issued to said plaintiff and

to his said wife by the defendant [13] company tickets entitling said plaintiff and his said wife to passage on the cars of said defendant from the city of San Bernardino to the city of San Jacinto; that the said plaintiff paid to the defendant for said tickets the usual, regular and customary fare; that said plaintiff thereafter, at about 4:15 P. M. of said date, with his said wife, boarded the train of said defendant standing in the railroad depot and yards of said defendant company at San Bernardino, California, and the said plaintiff and his said wife then and there, as passengers, entered one of the cars of said defendant then and there in charge of the officers, agents and employees of the said defendant company, intending and designing to ride upon said car and the train to which the same was then attached from said city of San Bernardino to said city of San Jacinto. That upon entering the car of the said defendant as aforesaid and in passing down the aisle of the car in order to obtain a seat, said plaintiff's wife, Carrie E. Nelson, violently collided with and fell over a travelling bag or other obstruction which said defendant had negligently placed and allowed to be placed in the aisle of said car. That said car, at all said times, was by said defendant negligently allowed to be and remain in a dark condition, the result of which was to render it difficult, if not impossible, for said Carrie E. Nelson or anyone else to see or observe said obstruction and traveling bag in said aisle of said car. That said Carrie E. Nelson was thereby thrown and hurled to the floor of said car; that said plaintiff's wife, said Carrie E. Nelson, was

thereby stunned, bruised, wounded and injured and she then and thereby suffered a broken bone in the right ankle and then and thereby the tendons, muscles and ligaments of said right foot, ankle and leg of the said Carrie E. Nelson were wrenched, twisted, bruised, sprained and torn away; that the said Carrie E. Nelson then and thereby suffered injuries of an internal nature and she also received therefrom a severe [14] nervous shock and thereby became and still is sick and sore and permanently injured and disabled; that said Carrie E. Nelson then and thereby suffered and sustained injuries to her right knee joint and then and thereby the ligaments, muscles, tendons and bones of said right knee were bruised, twisted, wrenched and torn, and as a result of the said injury to the said right knee plaintiff sustained and still sustains and suffers from the ailment, disease and condition known as water on the knee, and has been at all times since the date of said injury and now is unable to walk without aid; that she then and thereby suffered great pain in body and mind and was then and thereby thereafter confined to her bed for a period of about nine weeks, and that plaintiff is informed and believes, and therefore alleges the fact to be, that said Carrie E. Nelson will continue to be permanently sick and unable to perform her usual work and duties during the remainder of her lifetime, and thereby the services and help in the home and care of plaintiff's family and the comfort of the society of plaintiff's said wife as aforesaid, ever since said 15th day of June, 1912, have been and for all future time, as plaintiff is in-

formed and believes and therefore alleges, will continue to be lost to plaintiff; and thereby, ever since said injuries, plaintiff has been compelled, and will continue for an indefinite length of time to employ help and hire women and girls to do the work formerly done by his said wife; and plaintiff has been thereby, and during the remainder of the life of his said wife he will be thereby, compelled to watch over her; that plaintiff has been compelled thereby to, and during the life of his said wife will be thereby compelled to provide doctors, medical assistance, medicine and a nurse for her.

V.

That the said injuries to plaintiff's said wife, Carrie E. Nelson, were caused solely by defendant's negligence, and the [15] said injuries resulted directly and proximately from the negligence and from the gross, wanton and reckless carelessness and negligence of said defendant, its agents, servants and employees in charge of and running said train and cars at said time and place, to wit:

1. In placing the travelling bag or other obstruction in the aisle of said car and in a place in said car where passengers and the said Carrie E. Nelson entering or leaving said car would be likely to and must necessarily pass;

2. In allowing to be placed the travelling bag or other obstruction in the aisle of said car of the defendant and thereby obstructing the free ingress and egress of passengers in said car;

3. In placing an obstruction and allowing to be placed an obstruction in a dangerous position, ob-

structing the free passage of passengers and of Carrie E. Nelson to the seats in said car;

4. In allowing the said travelling bag or other obstruction or obstructions to remain in a dangerous position in the aisle of defendant's car and in a place which the defendant knew, or in the exercise of reasonable care should have known, passengers and said Carrie E. Nelson as a passenger would be obliged to pass in order to obtain a seat in said car;

5. In negligently permitting said car, at the time of the injuries of said Carrie E. Nelson, to be and remain so dark that it was difficult to see or observe any obstruction placed in the aisles of said car.

VI.

That the injuries to the said Carrie E. Nelson resulted directly and proximately from the negligence and from the gross, reckless and wanton negligence of the defendant, its agents, servants and employees in charge of and running said car and train [16] at said time.

VII.

That said plaintiff, by reason of said injuries aforesaid, suffered by his wife as aforesaid, has been compelled to pay, lay out and expend, and has paid, laid out and expended and become obligated for and on account of medical attendance of doctors, nurses' hire, drugs and medicines and hired help to do the work and services performed by his said wife prior to her said injuries, the aggregate sum of \$1,500, no part of which has been paid; that by reason of the matters hereinbefore stated, plaintiff has been dam-

aged in the sum of \$51,500, no part of which has been paid.

WHEREFORE plaintiff prays judgment against the defendant for the sum of fifty-one thousand five hundred dollars (\$51,500) and for costs of suit.

FLINT, GRAY & BARKER,
Attorneys for Plaintiff.

State of California,
County of Los Angeles,—ss.

A. H. Nelson, being duly sworn, says: That he is the plaintiff in the foregoing entitled action; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

A. H. NELSON.

Subscribed and sworn to before me this 30th day of October, 1913.

[Seal]

W. W. WEST,
Notary Public in and for the County of Los Angeles,
State of California. [17]

[Endorsed]: No. ——. Dept. ——. In the Superior Court of the State of California in and for the County of Los Angeles. A. H. Nelson, Plaintiff, vs. Atchison, Topeka & Santa Fe Railway Company, a Corporation, Defendant. Complaint. Flint, Gray & Barker, Suite 1027 Title Insurance Building, Fifth and Spring Streets, Los Angeles, California, Telephones: Home 10601, Sunset, Main 685, Attorneys for Plaintiff. [18]

*In the Superior Court of the State of California, in
and for the County of San Bernardino.*

A. H. NELSON and CARRIE E. NELSON,
Plaintiffs,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY, a Corporation,
Defendant.

Notice [of Petition for Removal, etc.].

To Messrs. Flint, Gray & Barker, Attorneys for
Plaintiffs.

GENTLEMEN:—YOU WILL PLEASE TAKE
NOTICE that on the 9th day of November, 1912, at
10 o'clock in the forenoon, or as soon thereafter as
counsel can be heard, the defendant, Atchison, To-
peka and Santa Fe Railway Company, a corporation,
will present a petition and bond for the removal of
the above-entitled action from the Superior Court
of the State of California in and for the County of
San Bernardino to the District Court of the United
States for the Southern District of California,
Southern Division, to the said Superior Court of San
Bernardino County, at the courthouse in the City of
San Bernardino, County of San Bernardino, and
State of California, pursuant to the statutes of the
United States in such cases made and provided; and
that copies of said petition and bond are hereto an-
nexed.

Dated November 7, 1912.

U. T. CLOTFELTER,
M. W. REED,
A. H. VAN COTT,
Attorneys for Defendant. [19]

[Endorsed]: No. 12,702. Dept. ——. In the Superior Court, State of California, County of San Bernardino. A. H. Nelson, Plaintiff, vs. A. T. & S. F. Ry. Co., Defendant. Notice. E. W. Camp, A. H. Van Cott, U. T. Clotfelter, M. W. Reed, 409 Kerckhoff Building, Los Angeles, Cal., Telephone: Main, 2980, Attorneys for Defendant. [20]

*In the Superior Court of the State of California, in
and for the County of San Bernardino.*

A. H. NELSON,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY, a Corporation,

Defendant.

Petition for Removal.

To the Honorable the Superior Court of the State of California, in and for the County of San Bernardino.

Your petitioner, The Atchison, Topeka and Santa Fe Railway Company, a corporation, presents this its petition and by it respectfully shows:

I.

That your petitioner is now and was at the time of the commencement of this action, for a long time prior thereto and ever since has been, a corporation organized and existing under and by virtue of the laws of the State of Kansas, having its principal place of business at the city of Topeka, in said State, and is not now and was not at the time of the com-

mencement of this action, and never has been, a corporation organized or incorporated under or by virtue of the laws of the State of California, and was at all of said times a citizen and resident of the State of Kansas, and is not now and was not at any of the times hereinbefore mentioned a citizen or resident of [21] the State of California, but was at all of said times a citizen of the State of Kansas and a nonresident of the State of California;

II.

That A. H. Nelson, the plaintiff in the above-entitled action, was at the time of said accident a citizen and resident of the State of California, and was not at any of said times and is not now a citizen or resident of the State of Kansas, but at all of said times has been and now is a nonresident of said State of Kansas;

III.

That the above-entitled action is a suit of a civil nature brought by the plaintiff to recover a judgment against your petitioner in the sum of Fifty-one Thousand Five Hundred Dollars (\$51,500.00), on account of alleged injuries to Carrie E. Nelson, wife of said plaintiff, caused, according to the allegations of said complaint, by the wrongful and negligent acts of your petitioner on or about the 15th day of June, 1912, in the county of San Bernardino, State of California;

IV.

That the complaint in the above-entitled action was filed on or about the 6th day of November, 1912, and summons was issued thereupon which was served

upon your petitioner in the County of Los Angeles, State of California, on the 7th day of November, 1912; that, according to the laws of the State of California, the time for answering in the above-entitled action has not yet expired, and your petitioner has has not [22] answered, demurred or otherwise pleaded to said complaint, or appeared in said suit or action;

V.

That the matter in controversy in the above-entitled suit or action exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00);

VI.

That your petitioner herewith presents a good and sufficient bond as provided by the statute in such cases, that it will, within thirty (30) days from the date of the filing of this petition, enter a certified copy of the record in the above-entitled action in the United States District Court, Southern District of California, Southern Division, and that your petitioner will pay all costs that may be awarded by the said District Court if it shall hold that the above-entitled action was wrongfully or improperly removed thereto.

WHEREFORE, your petitioner prays that said bond be accepted and approved; that the above-entitled action be removed into said District Court of the United States pursuant to the statutes of the United States in such cases made and provided; and that this Court proceed no further in this action, except to make the order of removal as prayed for,

accept the bond presented herewith and direct the clerk of this Court to prepare a certified copy of the record in the above-entitled action for entering in the said District Court of the United States. [23]

And your petitioner will ever pray.

THE ATCHISON, TOPEKA AND SANTA
FE RAILWAY COMPANY,

By _____,
_____,

Its Attorneys.

[Endorsed]: No. Dept. in the Superior Court, State of California, County of San Bernardino. A. H. Nelson, Plaintiff, vs. Atchison, Topeka and Santa Fe Ry. Co., Defendant. Petition for Removal. E. W. Camp, A. H. Van Cott, U. T. Clotfelter, M. W. Reed, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. [24]

*In the Superior Court of the State of California, in
and for the County of San Bernardino.*

A. H. NELSON,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, a Corporation,

Defendant.

Bond [on Removal].

KNOW ALL MEN BY THESE PRESENTS:
That The Atchison, Topeka and Santa Fe Railway Company, a corporation, as principal, and National

Surety Company, a corporation, as surety, are held and firmly bound unto A. H. Nelson, the plaintiff in the above-entitled action, his heirs, executors, administrators, successors or assigns, in the sum of One Thousand Dollars (\$1,000.00), lawful money of the United States, for the payment of which, well and truly to be made, we and each of us bind ourselves, our and each of our successors and assigns, as the case may be, jointly and severally by these presents.

THE CONDITION of this obligation is such that:

WHEREAS, the said The Atchison, Topeka and Santa Fe Railway Company has applied by petition to the Superior Court of the State of California, in and for the County of San Bernardino, for the removal of a certain cause there pending, wherein A. H. Nelson is plaintiff and The Atchison, Topeka and Santa Fe Railway Company is defendant, to the District [25] Court of the United States for the Southern District of the State of California, Southern Division, for further proceedings, on the grounds in said petition set forth, and that all further proceedings in said action in said Superior Court be stayed:

NOW, THEREFORE, if the said The Atchison, Topeka and Santa Fe Railway Company shall within thirty (30) days from and after the date of the filing of said petition, enter in said District Court of the United States a duly certified copy of the record in the above-entitled action, and shall pay or cause to be paid all costs that may be awarded therein by the said District Court of the United

States if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to remain in full force and effect.

Dated, this 5th day of December, 1912.

THE ATCHISON, TOPEKA AND SANTA
FE RAILWAY COMPANY,

By W. H. BREWER,

Its Asst. to Genl. Mngr.,

Principal.

[Seal]

Attest: Signed G. HOLTERHOFF, Jr.,

Its Western Assistant Secretary.

NATIONAL SURETY COMPANY,

[Seal]

By CHAS. SEYLER, Jr.,

Its Attorney in Fact,

Surety.

[Endorsed]: No. . . . Dept. . . . in the Superior Court, State of California, County of San Bernardino. A. H. Nelson, Plaintiff, vs. Atchison, Topeka and Santa Fe Ry. Co., Defendant. Bond. E. W. Camp, A. H. Van Cott, U. T. Clotfelter, M. W. Reed, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant.
[26]

*In the Superior Court of the State of California, in
and for the County of San Bernardino.*

A. H. NELSON,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, a Corporation,

Defendant.

Order for Removal.

The defendant in the above-entitled action having within the time provided by law filed its petition in due form for the removal of said action to the District Court of the United States for the Southern District of California, Southern Division, and having at the same time offered a good and sufficient bond as required by law, and said bond having been approved, and it appearing to the Court that said defendant is entitled to have said cause removed to said District Court of the United States:

NOW, THEREFORE, it is hereby ordered that this action be removed into the District Court of the United States for the Southern District of California, Southern Division, and that all further proceedings in this Court in said action are hereby stayed, and the Clerk of this Court is hereby directed to make a certified copy of the record in said action for entry in the said United States District Court.

Done this 6th day of December, 1912.

BENJAMIN BLEDSOE,

Judge. [27]

[Endorsed]: No. 12,755 Dept. In the Superior Court, State of California, County of San Bernardino. A. H. Nelson, Plaintiff, vs. Atchison, Topeka and Santa Fe Railway Company, Defendant. Order for Removal. E. W. Camp, A. H. Van Cott, U. T. Clotfelter, M. W. Reed, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant.

State of California,
County of San Bernardino,—ss.

I, Charles Post, County Clerk and ex-officio Clerk of the Superior Court of said County, do hereby certify the foregoing to be a full, true and correct copy of the Summons, Complaint, Notice of Motion for Removal, Petition for Removal, Bond and Order for Removal in the case of A. H. Nelson, vs. The Atchison, Topeka and Santa Fe Railway Co., on file in my office, and that I have carefully compared said copy with the original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 2d day of January, 1913.

[Seal]

CHARLES POST,
Clerk.

[Endorsed]: No. 228—Civil. United States District Court, Southern District of California, Southern Division. A. H. Nelson, vs. Atchison, Topeka and Santa Fe Railway Company. Certified Copy of Record on Removal from Superior Court of San Bernardino County. Filed Jan. 3, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [28]

*In the United States District Court in and for the
Southern District of California, Southern Division.*

A. H. NELSON,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, a Corporation,

Defendant.

Answer.

COMES NOW the defendant, and answering plaintiff's complaint herein, shows to the Court:

I.

The defendant has no knowledge or information sufficient to enable it to answer either or any of the allegations contained in Paragraphs II and III of the said complaint, and basing its denial thereon denies each and every of said allegations.

II.

Answering Paragraph IV of said complaint defendant denies that said plaintiff's wife, Carrie E. Nelson, collided with or fell over any traveling bag or other obstruction which said defendant had negligently or at all placed or allowed to be placed in any part of any car; and denies that any car of said defendant was at any time allowed by [29] said defendant to be or remain in a dark condition; and denies that by reason of the defendant allowing any car to remain in a dark condition it was difficult or impossible for the said Carrie E. Nelson, or anyone, to see or observe any obstruction or traveling

bag in any part of any such car; and denies that by reason of the defendant placing or allowing to be placed any bag or other obstruction in any car, or allowing any car to be or remain in a dark condition, or the said Carrie E. Nelson was thrown or hurled to the floor in any car, or was stunned, or bruised, or wounded, or injured or suffered a broken bone in the right ankle, or suffered any injuries whatever to any part of her body, or suffered, or sustained any disease or ailment, or has been or will at all be unable to walk without aid, or impaired at all in her ability to walk, or suffered pain in body or mind, or was confined to her bed for any period or will be, or continue to be, for any period sick or unable to perform her usual or any work or duties during any period; and denies that by reason of any of the matters set forth in the complaint, or any negligence of the said defendant, the services or help in the home or elsewhere, or care of the plaintiff's family, or the comfort or society of the plaintiff's wife ever have been or will be for any time lost to the plaintiff, or that the plaintiff has been or ever will be compelled to employ help or hire any women or girls, or anyone, to do any work formerly done by his said wife, Carrie E. Nelson, or that said plaintiff has been or ever will be compelled to watch over his said wife, Carrie E. Nelson, or has been or will be compelled to provide any doctor's or medical assistance, or medicine, or nurse for his said wife.

[30]

III.

Defendant denies that any injuries to his said

wife, Carrie E. Nelson, were caused solely or at all by any negligence of said defendant, or resulted directly or proximately, or at all, from any negligence, or gross, or wanton or reckless, or other carelessness or negligence of said defendant, or either or any of its servants, agents, or employees in any manner whatever, or in placing, or leaving, or causing to be placed or left, any traveling bag, or other obstruction in any part of any car; or in allowing to be placed any traveling bag or other obstruction in any part of any car, or thereby obstructing in anywise ingress or egress of passengers in any car; or in placing or allowing to be placed any obstruction in any dangerous or other position in any car, or obstructing the free or any passage of any passenger in any car; or in allowing any traveling bag or other obstruction to be or remain in a dangerous or any position in any part of any car, or in negligently or otherwise permitting any car at any time to be or remain so dark that it was difficult to see or observe any obstruction placed in any part of any car.

IV.

Defendant denies that any injuries set forth in the complaint, or at all, resulted directly or proximately or at all from any negligence of the defendant, or either or any of its agents, or employees, at any time or at all, at any place. [31]

V.

Defendant denies that the plaintiff by reason of any injuries suffered by said wife of said plaintiff, by reason of any of the matters set forth in said

complaint, or any negligent act or omission of said defendant, has been or will be compelled to pay, or lay out, or expend, or become obligated for or on account of medical attendance of doctors, or any attendance, or hire, or drugs, or medicine, or hired help to do any work or services, the aggregate sum of \$1500, or any sum whatever; and denies that by reason of any of the matters set forth in said complaint, or any negligent act or omission of said defendant, said plaintiff has been damaged in the sum of \$51,500, or any sum whatever.

VI.

And defendant further alleges that the injuries, if any suffered by said plaintiff's wife, Carrie E. Nelson, *was* caused solely by the negligence and carelessness of the said plaintiff's wife, Carrie E. Nelson; and that her said carelessness and negligence were the proximate cause of such injuries.

WHEREFORE, the defendant prays judgment that the plaintiff take nothing by his action, and for its costs thereof.

Attorneys for Defendant. [32]

State of California,
County of Los Angeles,—ss.

A. G. Wells, being by me first duly sworn, says that he is an officer, namely, the General Manager of the defendant company named in the foregoing Answer; that he has read said Answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein

stated on information or belief, and that as to those matters he believes it to be true.

A. G. WELLS.

Subscribed and sworn to before me this fifth day of February, A. D. 1913.

[Seal]

EDITH M. ASTBURY,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. 228-Civil. In the U. S. District Court, Southern Dist. of Cal., Southern Div. A. H. Nelson, Plaintiff, vs. A. T. & S. F. Ry. Co., Defendant. Answer. Received copy of the within answer Feb. 5, 1913. Flint, Gray & Barker. By T. Abbott. Filed Feb. 6, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. E. W. Camp, A. H. Van Cott, U. T. Clotfelter, M. W. Reed, Paul Burks, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. [33]

[Order Granting Motion for Leave to File a Supplemental Complaint, etc.]

At a stated term, to wit, the July Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Saturday, the twenty-seventh day of September, in the year of our Lord, one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 228—Civil S. D.

A. H. NELSON,

Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY, a Corporation,

Defendant.

Wheaton A. Gray, Esq., appearing as counsel for plaintiff; A. H. Van Cott, Esq., appearing as counsel for defendant; this cause having heretofore been submitted to the Court for its consideration and decision on plaintiff's motion for leave to file supplemental complaint; the Court having duly considered the same and being fully advised in the premises, now announces its conclusions thereon, and it is ordered that plaintiff's said motion for leave to file herein a supplemental complaint be, and the same hereby is granted, to which ruling of the Court, on motion of defendant, exceptions are, by direction of the Court, hereby entered herein; and it is further ordered, on motion of Wheaton A. Gray, Esq., of counsel for defendant, that the Clerk endorse said supplemental complaint as allowed and filed of this day; whereupon, it is stipulated by counsel for the respective parties, in open court, that a bill of exceptions as to the ruling of the Court on said motion for leave to file supplemental complaint may be filed ten (10) days after entry of judgment herein. [34]

[Endorsed]: No. 228—Civil. United States District Court, Southern District of California, Southern Division. A. H. Nelson, Plaintiff, vs. Atchison,

Topeka and Santa Fe Railway Company, a Corporation, Defendant. Copy of Order. Filed Nov. 21, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [35]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

No. 282-Civil.

A. H. NELSON,

Plaintiff,

vs.

HATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Defendant.

Notice [of Motion for Leave to File Supplemental Complaint].

To the Defendant in the Above-entitled Action and to A. H. Van Cott, Esq., et al., Its Attorneys:

YOU WILL PLEASE TAKE NOTICE that on Tuesday, the 2d day of September, 1913, at 10:30 A. M. of that day, or as soon thereafter as counsel can be heard, at the courtroom of said Court in the city of Los Angeles, County of Los Angeles, State of California, the above-named plaintiff will move the Court for leave to file a supplemental complaint herein, a copy of which said supplemental complaint is hereunto attached.

Said motion will be made and based on the papers hereunto annexed and upon the records and files in

both of said actions herein referred to.

FLINT, GRAY & BARKER,
Attorneys for Plaintiff. [36]

UNITED STATES OF AMERICA.

*District Court of the United States, Southern Dis-
trict of California, Southern Division.*

No. 282-Civil.

A. H. NELSON,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, a Corporation,

Defendant.

Supplemental Complaint.

Now comes the plaintiff in the above-entitled action and by leave of Court first had and obtained, files this his supplemental complaint and alleges as follows:

I.

That this action was originally begun in the Superior Court of the State of California, in and for the County of San Bernardino, on or about the 6th day of November, 1912, and summons was on that date duly issued therein and thereafter duly served upon the defendant. That thereafter and within the time allowed by law, such proceedings were had by and on behalf of the defendant that this said cause was, by order of said Superior Court duly made, given and entered therein, removed from said Superior Court to this the District Court of the United

States for the Southern District of California, Southern Division.

II.

That prior to the commencement of this action, the said plaintiff, A. H. Nelson, and Carrie E. Nelson, his wife, as [37] plaintiffs, on or about the 9th day of October, 1912, had commenced and did commence an action against the defendant herein, Atchison, Topeka and Santa Fe Railway Company, in the said Superior Court of the State of California, in and for the County of San Bernardino, by filing a complaint therein which is hereinafter set forth. That on said 9th day of October, 1912, a summons duly issued out of said Superior Court directed to the defendant to appear in said last-named case. Thereafter, service of said summons was duly had upon said defendant in said case, and thereafter such proceedings were had and taken by and on behalf of the defendant that said case was, by order of said Superior Court duly given, made and entered, removed from said Superior Court to this Court, the District Court of the United States for the Southern District of California, Southern Division, said case being numbered in this Court No. 217-Civil. That thereafter the defendant filed an answer in this Court in said case No. 217-Civil, and said last-mentioned case was thereafter duly set down for trial and tried before said District Court and a jury, said trial concluding on or about the 24th day of April, 1913; and said trial resulted in a verdict in favor of the plaintiffs in said case No. 217-Civil, in the sum of \$1,500.00, which verdict was duly and regularly entered and judgment

thereon also duly and regularly entered in said District Court in favor of plaintiffs and against defendant. That the following is a true copy of the pleadings and judgment in said case No. 217-Civil. [38]

*“In the Superior Court of the State of California, in
and for the County of San Bernardino.*

A. H. NELSON and CARRIE E. NELSON,
Plaintiffs,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY, a Corporation,
Defendant.

COMPLAINT.

Come now the plaintiffs and for cause of action against the defendant allege:

I.

That plaintiffs are now and were at all the times mentioned in this complaint husband and wife.

II.

That defendant is, and during all the times herein mentioned has been a corporation duly incorporated and existing and doing business in the county of San Bernardino, and at all of said times owned, controlled and operated a steam railway in the city of San Bernardino and the county of San Bernardino, State of California, together with rolling stock, cars, tracks, engines and other appurtenances thereto, and was at all of said times doing business thereon and therein as a common carrier of passengers for hire.

III.

That on the 15th day of June, 1912, plaintiffs purchased tickets from the ticket agent of the defendant company, and there was issued to said plaintiffs and to each of them by the defendant [39] company tickets entitling said plaintiffs and each of them to passage on the cars of said defendant from the city of San Bernardino to the city of San Jacinto; that the said plaintiffs and each of them paid to the defendant for said tickets the usual, regular and customary fare; that said plaintiffs thereafter, at about 4:15 P. M. of said date, boarded the train of said defendant standing in the railroad depot and yards of said defendant company at San Bernardino, California, and the said plaintiffs then and there, as passengers, entered one of the cars of said defendant then and there in charge of the officers, agents, servants, and employees of the said defendant company; that upon entering the car of the said defendant and in passing down the aisle of the car in order to obtain a seat, said plaintiff Carrie E. Nelson violently collided with and fell over a traveling bag which said defendant had negligently placed and allowed to be placed in the aisle of said car; that said Carrie E. Nelson was thereby violently thrown and hurled to the floor of said car; that said plaintiff Carrie E. Nelson was thereby stunned, bruised, wounded and injured and she then and thereby suffered a broken bone in the right ankle, and then and thereby the tendons, muscles and ligaments of said right foot, ankle and leg of the said Carrie E. Nelson were wrenched, twisted, bruised, sprained and torn away; that the said Carrie

E. Nelson then and thereby suffered injuries [40] of an internal nature and that she also received therefrom a severe nervous shock and thereby became and still is sick and sore and permanently injured and disabled; that said Carrie E. Nelson then and thereby suffered and sustained an injury to her right knee joint and then and thereby bruised, twisted, wrenched and tore the ligaments, muscles, tendons and bones of the said right knee and as a result of the said injury to the said right knee plaintiff sustained and has sustained and suffered from the ailment, disease and condition known as water on the knee and has been at all times since the date of said injury and now is unable to walk without aid; that she then and thereby suffered great pain in body and mind and was then and thereby thereafter confined to her bed for a period of about nine weeks, and that plaintiffs are informed and believe and therefore allege the fact to be that said Carrie E. Nelson will continue to be permanently sick and unable to perform her usual work and duties during the remainder of her lifetime and that she will continue to suffer greatly in body and mind for a long time to come and be compelled to submit to a long course of medical and surgical treatment for her recovery from said injuries.

That the said injuries to the said plaintiff Carrie E. Nelson were caused solely by the defendant's negligence as aforesaid and the said injuries resulted directly and proximately from the gross, wanton and reckless carelessness and negligence of the said defendant, its agents, servants and employees in charge

of and running said train and cars at said time and place, to wit: [41]

1. In placing the traveling bag or other obstruction in the aisle of said car and in a place in said car where passengers and the said Carrie E. Nelson entering or leaving said car were likely to, and must necessarily pass;

2. In allowing to be placed the traveling bag or other obstruction in the aisle of said car of the defendant and thereby obstructing the free ingress and egress of passengers in said car;

3. In placing an obstruction and allowing to be placed an obstruction in a dangerous position obstructing the free passage of passengers and of Carrie E. Nelson to the seats in said car;

4. In allowing the said traveling bag or other obstruction or obstructions to remain in a dangerous position in the aisle of defendant's car, and in a place which the defendant knew plaintiff Carrie E. Nelson would be obliged to pass in order to obtain a seat in said car.

V.

That the injuries to the said plaintiff Carrie E. Nelson resulted directly and proximately from the negligence and from the gross, reckless and wanton negligence of the defendant, its agents, servants and employees in charge of and running said cars at said time; that by reason of the matters hereinbefore stated, plaintiff Carrie E. Nelson has been damaged in the sum of \$50,000, no part of which has been paid.

WHEREFORE, plaintiffs pray judgment against the defendant for the sum of fifty thousand dollars

(\$50,000) and for costs of suit.

FLINT, GRAY & BARKER,
Attorneys for Plaintiffs." [42]

*"In the United States District Court in and for the
Southern District of California, Southern Divi-
sion.*

A. H. NELSON and CARRIE E. NELSON,
Plaintiffs,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, a Corporation,
Defendant.

ANSWER.

Comes now the defendant and answering the com-
plaint herein shows to the Court as follows:

I.

The defendant has no knowledge or information
sufficient to enable it to answer paragraph I of said
complaint, and basing its denial thereon denies the
whole of said paragraph.

II.

Defendant denies that upon entering the car of the
defendant mentioned in said complaint, or any car,
or at all, or passing down the aisle of said car, the
plaintiff, Carrie E. Nelson, violently, or at all, col-
lided, or fell over any traveling bag or anything
which said defendant had negligently or at all placed
or allowed to be placed in the aisle of such car, and
denies that the said Carrie E. Nelson was by reason
of falling over any traveling bag, or anything which

said defendant had negligently or at all placed or allowed to be placed in the aisle of any such car, violently or at all thrown or hurled to [43] the floor of such car; and denies that said plaintiff, Carrie E. Nelson, was by reason of colliding with or falling over any traveling bag or anything which said defendant had negligently or at all placed or allowed to be placed in the aisle of any car, stunned, bruised, or wounded or injured, or suffered any broken bone, or any injury whatever, or suffered any internal injuries whatever, or received any nervous shock, or became or is sick or sore or permanently injured or disabled; or suffered any ailment, disease or condition known as water on the knee, or any disease, or has been at any time unable to walk without aid, or at all, or suffered great or any pain in body or mind, or was confined to her bed for any period of time, or will continue to be permanently or at all sick or unable to perform her usual or any work or duties for any period of time, or will suffer greatly in body or mind or at all for any period of time, or be compelled to submit to any course of surgical or medical treatment before her recovery from any injuries.

III.

Defendant denies that any injuries to the plaintiff Carrie E. Nelson were caused solely or at all by any negligence of the defendant set forth in the complaint or otherwise; and denies that any injuries to said plaintiff resulted directly or proximately or at all from the gross, wanton or reckless or any carelessness or negligence or any carelessness or negligence of the defendant, or any or either of its servants,

agents or employees; and denies that any injuries to said plaintiff were caused solely or at all by reason of the defendant placing any bag or any obstruction in any aisle of any car [44] or in any place in any car; or in allowing to be placed any traveling bag or any obstruction in any part of any car, or thereby obstructing the free or any ingress or egress of any passenger in any car; or in placing any obstruction in any car, or in allowing to be placed any obstruction in any position obstructing the free or any passage of any passenger, or of the said plaintiff Carrie E. Nelson, to any seat in any car; or in allowing any traveling bag or thing or obstruction to remain in any position in any aisle of any car, or in any place of any car.

IV.

Defendant denies that any injury or injuries to the said plaintiff, Carrie E. Nelson, resulted directly or proximately, or at all, from any negligence, or gross, or reckless, or wanton negligence of the defendant, or its agents, or servants, or employees, or either or any of its agents, or servants, or employees, in charge of or running any car at the said or any time; and denies that by reason of any of the matters set forth in the said complaint, or of any act or omission of the defendant, the said plaintiff, Carrie E. Nelson, has been damaged in the sum of \$50,000, or in any sum whatever.

V.

And defendant further alleges that the injuries, if any, suffered by the said plaintiff, Carrie E. Nelson, were caused solely by her carelessness and negli-

gence; and that her said carelessness and negligence were the proximate cause of such injuries.

WHEREFORE, The defendant prays judgment that the plaintiffs take nothing by this action, and that it have its costs in said action.

A. H. VAN COTT,
Attorney for Defendant." [45]

"UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

No. 217—Civil.

A. H. NELSON and CARRIE E. NELSON,
Plaintiffs,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, a Corporation,
Defendant.

This cause having come on regularly for trial on the 17th day of April, 1913, being a day in the January Term, A. D. 1913, of the District Court of the United States for the Southern District of California, Southern Division, before the Court and a Jury of twelve (12) men duly impanelled; Wheaton A. Gray, Esq., and R. B. Turnbull, Esq., appearing as counsel for plaintiffs, and A. H. Van Cott, Esq., and Paul Burke, Esq., appearing as counsel for Defendant, and the trial having been proceeded with on the 17th, 18th, 21st, 22d, 23d and 24th days of April, 1913, and witnesses having been sworn and examined and documentary evidence having been introduced

on behalf of the respective parties, and the evidence having been closed, and the cause, after argument by counsel for the respective parties and the instructions of the Court, having, on said 24th day of April, 1913, been submitted to the Jury, and the Jury thereafter, on said 24th day of April, 1913, having rendered the following Verdict:

'In the District Court of the United States, for the Southern District of California, Southern Division.

No. 217—Civil.

A. H. NELSON and CARRIE E. NELSON,
Plaintiffs,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY,

Defendant.

We, the jury in [46] the above-entitled cause, find in favor of the plaintiffs, in the sum of \$1500.00.

Los Angeles, April 24th, 1913.

JOSEPH F. HUSTON,
Foreman.'

—and the Court having ordered that judgment be entered herein in accordance with said verdict, in favor of the plaintiffs and against the defendant in the sum of Fifteen Hundred (\$1500.00) Dollars;

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court, that A. H. Nelson and Carrie E. Nelson, plaintiffs herein, have and recover of and from the Atchison, Topeka and Santa Fe Railway Com-

pany, a corporation, defendant herein, the sum of Fifteen Hundred (\$1500.00) Dollars, together with the costs and disbursements of said plaintiffs in this behalf taxed at \$54.90/100.

Judgment entered April 24th, 1913.

WM. M. VAN DYKE,

Clerk.

By C. E. Scott,

Deputy Clerk."

III.

That said answer was filed by defendant within the time allowed by law and the stipulation of the parties. That upon the trial of said action No. 217-Civil, evidence was introduced upon all the issues made by said complaint and answer and evidence was also introduced upon said trial to establish all the allegations of paragraph V of the complaint herein, which included evidence to establish the last or fifth allegation of said paragraph V. The issue whether defendant negligently permitted its said car, at the time of the injury to said Carrie E. Nelson, to be and remain so dark that it was difficult to see or observe any obstruction placed in the aisles of said car, was treated as having been made in case No. 217-Civil by the pleadings therein, and evidence for and against said allegation was introduced by the several parties to said suit [47] without objection on either side. Also upon said trial of case No. 217-Civil, paragraph V of defendant's answer was treated by both parties as a sufficient plea and the allegations thereof as constituting a sufficient defense of contributory negligence on the part of the plaintiffs in said case, and

evidence for and against said allegation and defense of contributory negligence was introduced by the respective parties to said action without objection, and said case was tried in all respects as if said plea and defense of contributory negligence on the part of plaintiffs had been properly set up in said answer.

IV.

That upon said trial of case No. 217-Civil, the issues with respect to whether or not the plaintiffs therein were negligent were precisely the same as the issues with respect to the negligence of plaintiff here in this case, and depended for their determination upon exactly the same evidence, and the same evidence was introduced upon the trial thereof as would be used and be depended upon in respect to that same issue of negligence were said issue to be tried again in this action. That the issues with respect to the contributory negligence of the plaintiff were the same in the action No. 217-Civil and depended for their determination upon the same evidence, and the same evidence was used in the trial of said case No. 217-Civil as would necessarily be used in that same issue of contributory negligence as framed in this action by the pleadings herein. That the same car, the same persons and parties, the same date, the same traveling bag or other obstructions and the same acts with respect to whether said plaintiff was negligent, or whether the defendant was negligent, and as to whose negligence caused the injury resulting to the plaintiff Carrie E. Nelson, are each and all [48] involved in each and both of said actions.

V.

That said judgment in said action No. 217-Civil was duly entered in the above-entitled court on the 24th day of April, 1913, and subsequently and before the verification and filing of this supplemental complaint the defendant in said action No. 217-Civil and in this action did pay to plaintiffs in said action No. 217-Civil the amount of said judgment and said judgment was thereupon and prior to the verification and filing of this supplemental complaint, satisfied by said plaintiffs, and said judgment has become and is final and conclusive between each and all of the parties in said action No. 217-Civil.

VI.

Plaintiff herein therefore sets up the judgment-roll in the said action No. 217-Civil as *res adjudicata* as conclusive upon and as an estoppel in respect to all issues in this case concerning the negligence of the respective parties hereto, and the operation and effect of the negligence of either or any of said parties as a proximate or producing cause of the injuries complained of herein, and avers that upon the strength of said judgment hereinabove pleaded, the Court should adjudicate and determine, upon the strength of that judgment alone, that the defendant herein was guilty of the negligence complained of in the complaint and that said negligence of said defendant was the proximate cause of the injuries referred to and complained of in the complaint herein, and that the plaintiff A. H. Nelson, was not guilty of any want of ordinary care or negligence which contributed to the said injuries of his wife.

WHEREFORE, plaintiff prays that it may be held and adjudged by this Court as above indicated.

FLINT, GRAY & BARKER,
Attorneys for Plaintiff. [49]

United States of America,
Southern District of California,
Southern Division,
County of Los Angeles,—ss.

L. W. Jutten, being duly sworn, says: That he is a member of the firm of Flint, Gray & Barker, attorneys for plaintiff in the above-entitled action, that the said plaintiff does not reside in the county of Los Angeles, but is absent therefrom and resides in the county of San Bernardino, State of California; that said firm of attorneys have, and said L. W. Jutten has, offices in the said county of Los Angeles and not elsewhere, for which reason affiant verifies this complaint on behalf of said plaintiff; that affiant has read the foregoing Supplemental Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true.

L. W. JUTTEN.

Subscribed and sworn to before me this 22d day
August, A. D. 1913.

[Seal] DAISY ROBERTS,
Notary Public in and for the County of Los An-
geles, State of California.

[Endorsed]: No. 228-Civil. United States District Court, Southern District of California, South-

ern Division. A. H. Nelson, Complainant, vs. Atchison, Topeka & Santa Fe Railway Company, a Corporation, Defendant. Notice and Supplemental Complaint. Filed Aug. 22, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Service of the within Notice and Sup. Comp. is hereby admitted this 22d day of August, 1913. U. T. Clotfelter, A. H. Van Cott, M. W. Reed, Attorneys for Defendant. Flint, [50] Gray & Barker, Equitable Bank Building, First and Spring Sts., Los Angeles, Cal., Main 685, Home 10601, Solicitors for Plaintiff. Allowed and filed September 27, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [51]

*In the District Court of the United States, Southern
District of California, Southern Division.*

A. H. NELSON,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,

Defendant.

Demurrer to Supplemental Complaint.

Comes now the defendant and demurs to the supplemental complaint filed by the plaintiff herein by leave of Court, upon the ground that the said supplemental complaint does not state facts sufficient to

constitute cause of action.

U. T. CLOTFELTER,
M. W. REED,
A. H. VAN COTT,
Attorneys for Defendant.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

A. H. VAN COTT,
Attorney for Defendant.

[Endorsed]: No. 228-Civil. Dept. ——. In the U. S. Dist. Court, Southern Dist. of Cal., So. Div. A. H. Nelson, Plaintiff, vs. The A. T.-S. F. Ry. Co., a Corp., Defendant. Demurrer to Supplemental Complaint. Filed Oct. 7, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within demurrer this 7 day of Oct., 1913. Flint, Gray & [52] Barker, Attorneys for Plaintiff. E. W. Camp, U. T. Clotfelter, A. H. Van Cott, M. W. Reed, Paul Burks, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. [53]

[Order Overruling Demurrer to Supplemental Complaint, etc.]

At a stated term, to wit, the July Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the twentieth day of October, in the year of our Lord one thousand nine hundred and

thirteen. Present: The Honorable OLIN
WELLBORN, District Judge.

No. 228—Civil S. D.

A. H. NELSON,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,
Defendant.

This cause coming on this day to be heard on defendant's demurrer to plaintiff's supplemental complaint, Wheaton A. Gray, Esq., appearing as counsel for plaintiff, Paul Burks, Esq., appearing as counsel for defendant, now, with the consent of Paul Burks, Esq., of counsel for defendant, it is ordered that the demurrer of defendant to plaintiff's supplemental complaint be, and the same hereby is overruled, the right being reserved to defendant to withdraw said consent and move to have this order vacated within ten (10) days, defendant, however, to answer said supplemental complaint within ten (10) days, if this order be not so vacated.

[Endorsed]: No. 228—Civil. United States District Court, Southern District of California, Southern Division. A. H. Nelson, Plaintiff, vs. The Atchison, Topeka & Santa Fe Railway Company, a Corporation, Defendant. Copy of Order. Filed Nov. 21, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [54]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

No. 282—Civil.

A. H. NELSON,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,
Defendant.

Answer to Supplemental Complaint.

Comes now the defendant, The Atchison, Topeka and Santa Fe Railway Company, a Corporation, and answering the supplemental complaint herein shows to the Court as follows:

Answering paragraph VI of said complaint the defendant denies that the judgment-roll in action No. 217—Civil or any other action is *res adjudicata* or conclusive upon or an estoppel in respect to all or any issues in this case concerning the negligence of either of the parties hereto, or the operation or effect of negligence of either or any of said parties as proximate or producing or any cause of any injuries complained of herein, and denies that upon the strength of the said or any judgment the Court should adjudicate or determine upon the strength of said judgment alone, or at all, that the defendant herein was guilty of the negligence complained of in the complaint or any negligence, or that said negligence of said defendant was the proximate or any cause of any injuries referred to or complained

of in the complaint herein, or at all, or that the plaintiff, A. H. Nelson, [55] was not guilty of any want of ordinary care or negligence which contributed to the said or any injuries of his wife.

WHEREFORE, defendant prays that the plaintiff have no relief and take nothing by the said supplemental complaint.

U. T. CLOTFELTER,
M. W. REED,
A. H. VAN COTT,
Attorneys for Defendant.

State of California,
County of Los Angeles,—ss.

A. G. Wells, being by me first duly sworn, says that he is an officer, namely, the General Manager of The Atchison, Topeka & Santa Fe Railway Co., named in the foregoing answer; that he has read said answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and that as to those matters he believes it to be true.

A. G. WELLS.

Subscribed and sworn to before me this 5th day of November, A. D. 1913.

[Seal] C. N. STEDMAN,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. 228—Civil. In the District Court of the United States, in and for the Southern District of California, Southern Division. A. H. Nelson, Plaintiff v. The Atchison, Topeka and Santa Fe Railway Company, a Corporation, Defendant.

Answer to Supplemental Complaint. Filed Nov. 5, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within Nov. 5, 1913, Flint, Gray & Barker, By Zelia Walker. E. W. Camp, A. H. Van Cott, U. T. Clotfelter, M. W. Reed, Paul Burks, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. [56]

[Verdict.]

*In the District Court of the United States, for the
Southern District of California, Southern Di-
vision.*

No. 228—Civil.

A. H. NELSON,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, a Corporation,

Defendant.

We, the Jury in the above-entitled cause, find in favor of the plaintiff, in the sum of \$4,000.00.

Los Angeles, California, November 20th, 1913.

H. N. WELLS,

Foreman.

[Endorsed]: 228—Civil. U. S. District Court, Southern District of Calif., Southern Division. A. H. Nelson vs. A. T. & S. F. Ry. Co. Verdict. Filed November 21, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [57]

[Judgment.]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

No. 228—Civil.

A. H. NELSON,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, a Corporation,

Defendant.

This cause having come on regularly for trial on the 19th day of November, 1913, being a day in the July Term, A. D. 1913, of the District Court of the United States for the Southern District of California, Southern Division, before the Court and a jury of twelve (12) men impanelled; Wheaton A. Gray, Esq., appearing as counsel for plaintiff, and A. H. Van Cott, Esq., appearing as counsel for defendant; and the trial having been proceeded with on the 19th, and 20th days of November, 1913, and witnesses having been sworn and examined and documentary evidence having been introduced on behalf of the plaintiff, and the evidence having been closed, and the cause, after argument by counsel for the respective parties and the instructions of the Court, having, on said 20th day of November, 1913, been submitted to the Jury, and the Jury, thereafter, on the 21st day of November, 1913, having rendered the following Verdict:

“In the District Court of the United States, for the Southern District of California, Southern Division.

No. 228—Civil.

A. H. NELSON,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, a Corporation,

We, the jury in the above-entitled cause, find in favor of the plaintiff, in the sum of \$4,000.

Los Angeles, California, November 20th, 1913.

H. N. WELLS, [58]

Foreman.”

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court, that A. H. Nelson, plaintiff herein, have and recover of and from the Atchison, Topeka and Santa Fe Railway Company, a Corporation, defendant herein, the sum of \$4,000.00, together with the costs and disbursements of said plaintiff, in this behalf taxed at \$83.30.

Judgment entered November 21st, 1913.

WM. M. VAN DYKE,

Clerk.

By C. E. Scott,

Deputy Clerk.

[Endorsed]: No. 228—Civil. United States District Court, Southern District of California, Southern Division. A. H. Nelson, Plaintiff, vs. Atchison, Topeka and Santa Fe Railway Company, a Corpora-

tion, Defendant. (Copy of) Judgment. Filed Nov. 21, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [59]

[Certificate of Clerk U. S. District Court to Judgment and Judgment-roll.]

In the District Court of the United States, for the Southern District of California, Southern Division.

No. 228—Civil.

A. H. NELSON,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a true copy of the Judgment entered in the above-entitled action, and recorded in Judgment Book No. 2 of said Court, for the Southern Division, at page 235 thereof, and I further certify that the foregoing papers hereto annexed, constitute the judgment-roll in said action.

Attest my hand and the seal of said District Court, this 21st day of November, A. D. 1913.

[Seal]

WM. M. VAN DYKE,

Clerk.

By C. E. Scott,

Deputy Clerk.

[Endorsed]: No. 228-Civil. In the District Court of the United States for the Southern District of California, Southern Division. A. H. Nelson, vs. Atchison, Topeka and Santa Fe Railway Co., a Corp. Judgment-roll. Filed November 21, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Recorded Judg. Register Book No. 2, page 235. [60]

In the District Court of the United States of America, Southern District of California, Southern Division.

A. H. NELSON,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED that on the 19th day of November, 1913, this action came on regularly for trial before the Honorable F. H. Rudkin, Judge, Gray, Barker and Bowen, Esqs., appearing for plaintiff and U. T. Clotfelter, M. W. Reed and A. H. Van Cott, Esqs., appearing for defendant, and a jury having been regularly impaneled and sworn, plaintiff introduced certain testimony tending to prove the amount of damages claimed to have been suffered by him by reason of the injuries claimed to have been inflicted upon his wife.

Exception No. I.

And thereafter counsel for plaintiff offered in evidence the judgment-roll in the case of A. H. Nelson and Carrie E. Nelson vs. The Atchison, Topeka and Santa Fe Railway Company, a corporation, being case No. 217, Civil, in this court, being the pleadings and judgment whereof copies are attached to and made a part of plaintiff's supplemental complaint herein, for the purpose, and counsel for plaintiff stated that said evidence was offered to show that the injury received by Mrs. Nelson was the proximate and direct result of the negligence of the defendant and in no way to be [61] attributed to her own negligence; and that said evidence was offered as conclusive upon the question of the liability of the defendant on this injury. To which offer and evidence defendant, by its counsel objected on the ground that such evidence was incompetent, irrelevant and immaterial, on the ground that the judgment in the case between the husband and wife and the railway company is not *res judicata* in an action by the husband for his expenses and loss of services. Which objection was overruled, to which ruling defendant then and there excepted.

Exception No. II.

And thereupon the said judgment-roll was read to the jury, and the plaintiff rested his case, and therethereupon Mr. Van Cott, on behalf of the defendant, moved for a non-suit on the ground that the plaintiff had produced no competent evidence of any negligence on the part of the defendant or of freedom from contributory negligence on the part of Mrs.

Carrie E. Nelson, the plaintiff's wife. Which motion was denied, and to this ruling the defendant then and there excepted.

Exception No. III.

And thereupon the defendant rested and moved the Court to direct a verdict in favor of the defendant; which motion the Court denied; and to which ruling the defendant then and there excepted. [62]

Exception No. IV.

And thereupon the Court instructed the jury among other things as follows:

“Gentlemen of the jury, you are instructed that the judgment in the case of A. H. Nelson and Carrie E. Nelson, plaintiffs, vs. Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant, No. 217—Civil, in this Court, on the 24th day of April, 1913, is conclusive on the use of due care on the part of the plaintiff's wife, and that the negligence of the defendant was the proximate cause of the injury to plaintiff's wife and to plaintiff, in the case now on trial, and therefore, you are instructed that your verdict must be in favor of the plaintiff in this case in some amount.”

To which instruction the defendant then and there excepted.

Dated at Los Angeles, California, this 5th day of December, 1913.

Respectfully submitted,
U. T. CLOTFELTER,
M. W. REED,
A. H. VAN COTT,
Attorneys for Defendant. [63]

[Stipulation as to Bill of Exceptions.]

It is hereby stipulated and agreed that the foregoing is a full, true and correct bill of exceptions in the above-entitled action and that the same may be settled, allowed and filed.

Dated at Los Angeles, California, this 12th day of December, 1913.

FLINT, GRAY & BARKER,
Attorneys for Plaintiff.

U. T. CLOTFELTER,
M. W. REED,

A. H. VAN COTT,
Attorneys for Defendant.

[Order Settling and Allowing Bill of Exceptions.]

The foregoing bill of exceptions is hereby settled, allowed and ordered to be filed.

Dated at Los Angeles, California, this 12 day of December, 1913.

FRANK H. RUDKIN,
Judge.

[Endorsed]: No. 228-Civil. In the District Court of the United States, Sou. Dist. of Calif., Southern Division. A. H. Nelson, Plaintiff, vs. The Atchison, Topeka & Santa Fe Ry. Co., a Corporation, Defendant. Bill of Exceptions. Filed Dec. 12, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. E. W. Camp, A. H. Van Cott, U. T. Clotfelter, M. W. Reed, Paul Burks, 409 Kerkhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. [64]

*In the District Court of the United States of
America, Southern District of California,
Southern Division.*

A. H. NELSON,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,
Defendant.

Assignment of Errors.

COMES NOW the defendant, Atchison, Topeka and Santa Fe Railway Company, a corporation, and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause, petition for which writ it files at the same time with this assignment.

I.

The said Court erred in receiving in evidence the judgment-roll in the case of A. H. Nelson and Carrie E. Nelson, vs. The Atchison, Topeka and Santa Fe Railway Company, a corporation, being Case No. 217-Civil, in this Court, being the pleadings and judgment whereof copies are attached to and made a part of plaintiff's supplemental complaint.

II.

The said Court erred in denying the defendant's motion for a nonsuit, made by it at the close of the plaintiff's case. [65]

III.

The said Court erred in denying the defendant's

motion that said Court direct a verdict against the plaintiff and in favor of defendant, made by it at the close of all the evidence in the case.

IV.

The said Court erred in instructing the jury as follows:

“Gentlemen of the jury, this is a civil action by the husband to recover damages for loss resulting to him personally from an accident suffered by his wife while a passenger on a railroad train, as appears from the testimony, a former action was brought by the husband and wife against the railroad company and in that action a judgment of \$1500 was recovered for the injury suffered by the wife. That judgment is conclusive upon you both as to the damages sustained by the wife in that accident and as to the negligence of the defendant company and the lack of contributory negligence on the part of the wife. In other words, you are instructed that the judgment in the case of A. H. Nelson and Carrie E. Nelson, plaintiffs, vs. Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant, No. 217-Civil, in this Court, on the 24th day of April, 1913, is conclusive on the use of due care on the part of the plaintiff’s wife, and that the negligence of the defendant was the proximate cause of the injury to plaintiff’s wife and to plaintiff, in the case now on trial, and therefore, you are instructed that [66] your verdict must be in favor of the plaintiff in this case.”

V.

The said Court erred in instructing the jury as follows:

“The judgment referred to in the last instruction settles the question of the liability of the defendant to the plaintiff in some amount of damages, and the only question left for you to determine is the amount of such damages, and you should, in your verdict, compensate the plaintiff for such pecuniary loss as he has suffered by reason of the injuries received by his wife; and in fixing his damages you should take into account all moneys necessarily expended in medical care and attention for his wife, incurred by reason of her injuries mentioned in the complaint, and he is also entitled to compensation for any pecuniary loss on account of being deprived of the services of his said wife in his household, in the way of cooking, housekeeping and caring for and taking care of said plaintiff and the minor children of said plaintiff and his said wife, in caring for the home in which said family lives, including any services performed by her in the matter of cooking for employees and hired men of her husband, together with any loss or impairment of the comfort and society of plaintiff’s wife to him, occasioned by her said injuries. In your verdict, you may also reimburse him for any pecuniary loss caused or necessitated by said injuries to his wife, in the employment of help to do the work formerly done by his said wife, as well as for any loss of time in his own [67] work and attention to his business by himself personally, caused directly by his wife’s injuries.”

And upon the foregoing assignment of errors and upon the record in said cause, the defendant prays that said judgment and verdict may be reversed.

Dated February 16, 1914.

U. T. CLOTFELTER,

M. W. REED,

A. H. VAN COTT,

Attorneys for Defendant.

[Endorsed]: No. 228—Civil. In the U. S. District Court, Southern Dist. of Cal., Southern Div. A. H. Nelson, Plaintiff, vs. A. T. & S. F. Ry. Co., a Corp., Defendant. Assignment of Errors. Filed February 17, 1914. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. E. W. Camp, A. H. Van Cott, U. T. Clotfelter, M. W. Reed, Paul Burks, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for [68]

In the District Court of the United States of America, Southern District of California, Southern Division.

A. H. NELSON,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,
Defendant.

Petition for Writ of Error.

The Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant in the above-entitled cause, feeling itself aggrieved by the

verdict of the jury and judgment entered on the twenty-first day of November, 1913, comes now by U. T. Clotfelter, M. W. Reed and A. H. Van Cott, its attorneys, and files herewith an assignment of errors, and petitions said Court for an order allowing said defendant to procure a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated February 16, 1914.

U. T. CLOTFELTER,

M. W. REED,

A. H. VAN COTT,

Attorneys for Defendant. [69]

[Endorsed]: No. 228-Civil. In the U. S. District Court, Southern Dist. of Cal., Southern Div. A. H. Nelson, Plaintiff, vs. A. T. & S. F. Ry. Co., a Corp., Defendant. Petition for Writ of Error. Filed February 17, 1914. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. E. W. Camp, A. H. Van Cott, U. T. Clotfelter, M. W. Reed, Paul Burks, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. [70]

*In the District Court of the United States of America,
Southern District of California, Southern
Division.*

A. H. NELSON,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,
Defendant.

Order Allowing Writ of Error.

Upon motion of U. T. Clotfelter, M. W. Reed, and A. H. Van Cott, attorneys for defendant, and upon filing a petition for a writ of error and an assignment of errors,—

IT IS ORDERED that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the verdict and judgment heretofore entered herein.

Dated February 17, 1914.

OLIN WELLBORN,

Judge.

[Endorsed]: No. 228—Civil. In the U. S. District Court, Southern Dist. of Cal., Southern Div. A. H. Nelson, Plaintiff, vs. A. T. & S. F. Ry. Co., a Corp., Defendant. Order Allowing Writ of Error. Filed February 17, 1914. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. E. W. Camp, A. H. Van Cott, U. T. Clotfelter, M. W. Reed, Paul Burks, 409 Kerkhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. [71]

In the District Court of the United States of America, Southern District of California, Southern Division.

A. H. NELSON,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,
Defendant.

Order Staying Proceedings.

The defendant, Atchison, Topeka and Santa Fe Railway Company, a corporation, having this day filed its petition for a writ of error from the verdict and judgment made and entered herein to the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, together with an assignment of errors, within due time, and also praying that an order be made fixing the amount of security which defendant should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this Court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals, and said petition having this day been duly allowed;

NOW, THEREFORE, it is ordered that upon the said defendant filing with the clerk of this court a good and sufficient bond in the sum of Six Thousand Dollars (\$6,000), to the effect that if the said defendant and plaintiff in error shall prosecute the said writ of error with effect, and answer all damages and costs if it fails to make its plea good, then

the said obligation to be void, else to [72] remain in full force and virtue, the said bond to be approved by the Court, that all further proceedings in this court be and they are hereby suspended and stayed until the determination of said writ of error, by said United States Circuit Court of Appeals.

Dated February 17, 1914.

OLIN WELLBORN,
Judge.

[Endorsed]: No. 228-Civil. In the U. S. District Court, Southern Dist, of Cal., Southern Div. A. H. Nelson, Plaintiff, vs. A. T. & S. F. Ry. Co., a Corp., Defendant. Order Staying Proceedings. Filed February 17, 1914. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. E. W. Camp, A. H. Van Cott, U. T. Clotfelter, M. W. Reed, Paul Burks. 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendants. [73]

In the District Court of the United States of America, Southern District of California, Southern Division.

A. H. NELSON,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:

That we, The Atchison, Topeka and Santa Fe Rail-

way Company, a corporation, as principal, and National Surety Company, a corporation, as surety, are held and firmly bound unto A. H. Nelson, plaintiff above named, in the sum of Six Thousand Dollars (\$6,000) to be paid to said A. H. Nelson, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the sixteenth day of February, 1914.

WHEREAS, the above-named defendant, the Atchison, Topeka and Santa Fe Railway Company, a corporation, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause by the District Court of the United States, for the Southern District of California, [74] Southern Division, rendered and entered in the said cause on the twenty-first day of November, 1913;

NOW, THEREFORE, the condition of this obligation is such that if the above-named, The Atchison, Topeka and Santa Fe Railway Company, shall prosecute the said writ with effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

Dated February 16, 1914.

THE ATCHISON, TOPEKA AND SANTA
FE RAILWAY COMPANY.

By W. H. BREWER,
Its Assistant to General Manager.

[Seal] Attest:

G. HOLTERHOFF, Jr.,

Its Western Assistant Secretary.

[Seal] NATIONAL SURETY COMPANY,

By H. F. STEWART,

Its Resident Vice-president.

Attest: H. EVERETT CHARLTON,

Resident Assistant Secretary.

Approved this 17th day of February, 1914.

OLIN WELLBORN,

Judge. [75]

**Affidavit, Acknowledgment, and Justification by
Guaranty or Surety Company.**

State of California,

County of Los Angeles,—ss.

On this sixteenth day of February, one thousand nine hundred and fourteen, before me personally came H. F. Stewart, known to me to be the Resident Vice-president of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of Atchison, Topeka and Santa Fe Railway Company, a Corp., as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of Los Angeles, State of California; that he is the Resident Vice-president of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894, that the seal affixed to the within bond of Atchison, Topeka and Santa Fe

Railway Company, a Corp., is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Resident Vice-president of said Company, and that he is acquainted with H. Everett Charlton and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said H. Everett Charlton, subscribed to said Bond is in the genuine handwriting of said H. Everett Charlton, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Twelve Thousand Dollars.

That Frank L. Gilbert is our agent to acknowledge service [76] in the Judicial District wherein this bond is given.

H. F. STEWART.

(Deponent's signature.)

Sworn to, acknowledged before me, and subscribed in my presence this sixteenth day of February, 1914.

[Seal]

HAZEL JONES,

(Officer's signature, description and seal.)

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. 228—Civil. In the United States District Court, Southern District of California, Southern Division. A. H. Nelson, Plaintiff, vs. The Atchison, Topeka and Santa Fe Ry. Co., Defend-

ant. Bond. Filed February 17, 1914. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. E. W. Camp, A. H. Van Cott, U. T. Clotfelter, M. W. Reed, Paul Burks, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. [77]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. 228-Civil.

A. H. NELSON,

Plaintiff,

vs.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY, a Corporation,
Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing seventy-seven (77) typewritten pages, numbered from 1 to 77 inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the pleadings, and of all papers and proceedings upon which the judgment in favor of the plaintiff was made and entered in said cause, and also of the bill of exceptions, assignment of errors, petition for writ of error, order allowing writ of error, order staying proceedings, and bond on writ of error, in

the above and therein entitled cause, and that the same together constitute the return to the annexed writ of error;

I do further certify that the cost of the foregoing record [78] is \$32.05, the amount whereof has been paid to me by The Atchison, Topeka and Santa Fe Railway Company, a corporation, the plaintiff in error in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 14th day of April, in the year of our Lord, one thousand nine hundred and fourteen, and of our Independence the one hundred and thirty-eighth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States, in
and for the Southern District of California.

[79]

[Endorsed]: No. 2406. United States Circuit Court of Appeals for the Ninth Circuit. The Atchison, Topeka and Santa Fe Railway Company, a Corporation, Plaintiff in Error, vs. A. H. Nelson, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Received and filed April 16, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Order Enlarging Time to May 1, 1914, to File
Record Thereof and to Docket Cause in Ap-
pellate Court.]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY,

Plaintiff in Error,

vs.

A. H. NELSON,

Defendant in Error.

Good cause appearing therefor, it is hereby or-
dered that the time heretofore allowed said plain-
tiff in error to docket said cause and file the record
thereof, with the Clerk of the United States Cir-
cuit Court of Appeals for the Ninth Circuit, at San
Francisco, California, be, and the same hereby is,
enlarged and extended to and including the 1st day
of May, 1914.

Dated at San Diego, California, March 10th, 1914.

OLIN WELLBORN,

United States District Judge, Southern District of
California.

[Endorsed]: No. 2406. United States Circuit
Court of Appeals for the Ninth Circuit. Order Un-
der Rule 16 Enlarging Time to May 1, 1914, to File
Record Thereof and to Docket Case. Filed Mar. 11,
1914. F. D. Monekton, Clerk. Refiled Apr. 16,
1914. F. D. Monekton, Clerk.

4
No. 2406.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

The Atchison, Topeka and Santa
Fe Railway Company, a corpor-
ation,

Plaintiff in Error,
vs.

A. H. Nelson,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

U. T. CLOTFELTER,
A. H. VAN COTT,
M. W. REED,
E. W. CAMP,

Attorneys for Plaintiff in Error.

No. 2406.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

The Atchison, Topeka and Santa
Fe Railway Company, a corpor-
ation,

Plaintiff in Error,
vs.

A. H. Nelson,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

A. H. Nelson brought an action in the Superior Court of the state of California, in and for the county of San Bernardino, to recover damages on account of monies expended for services of doctors and nurses, for the cost of drugs and medicine and hired help, and for the loss of the services of his wife, all growing out of an injury suffered by his wife while a passenger on one of the cars of The Atchison, Topeka and Santa Fe Railway Company in the state of California [Tr. pp. 7 to 13].

On petition of the plaintiff in error the case was removed to the District Court of the United States on the ground of diverse citizenship [15]. Thereafter a supplemental complaint was filed [30] stating that before the commencement of this action Nelson and his wife had sued the same defendant for the injuries to her person suffered by said wife in the same accident, which is referred to in the complaint in the case at bar. The supplemental complaint set out the pleadings and judgment in the former case, and plaintiff declared in paragraph 6 of the supplemental complaint [43] that he set up the judgment roll in the former action as *res adjudicata*, as conclusive upon and as an estoppel in respect to all issues in the case at bar concerning the negligence of the respective parties to the case at bar and the operation and effect of the negligence of either or any of said parties as proximate or producing cause of the injury complained of, and averred that, upon the strength of said judgment the court ought to adjudicate and determine that the defendant was guilty of negligence, and that said negligence was the proximate cause of the injuries complained of; that the plaintiff A. H. Nelson was not guilty of any want of ordinary care or negligence which contributed to the injuries of his wife. There was no claim made by the Railway Company in the case at bar that the plaintiff A. H. Nelson had been guilty of contributory negligence, but it was alleged in the answer [26] that the plaintiff's wife had been guilty of negligence which was the proximate cause of her injuries. Defendant answered the supplemental complaint [48], denying that the judgment roll in the former case was *res*

adjudicata, or conclusive, or an estoppel in respect to any of the issues in the present case.

The case came on for trial on November 13, 1913 [51], and was tried before a jury, which rendered a verdict for \$4,000.00 [50], on which judgment was entered [52]. At the trial the judgment roll, which had been set out in the supplemental complaint, was introduced in evidence, over the objection of the plaintiff in error. That and evidence of the amount of damages was all the case for the plaintiff, and the defendant introduced no evidence [55-6]. The court instructed the jury that the judgment roll was conclusive on the use of due care on the part of the plaintiff's wife, and on the proposition that the negligence of the defendant was the proximate cause of the injury to the plaintiff's wife and to the plaintiff in the case at bar, and that the jury must find for the plaintiff in some sum [56]. The only question in the case on this writ of error is the admissibility and effect as evidence of the judgment roll in the case brought by the plaintiff and his wife.

SPECIFICATION OF ERRORS.

I.

The court erred in admitting in evidence over the objection of the plaintiff in error the judgment roll in the case of A. H. Nelson and Carrie E. Nelson v. The Atchison, Topeka and Santa Fe Railway Company [55]. That judgment roll consisted of a complaint [32] stating that plaintiffs are and were at all of the times mentioned in the complaint husband and wife; that the defendant is and at all of the times mentioned

was a corporation doing business as a common carrier of passengers for hire; that on June 15, 1912, plaintiffs purchased tickets entitling them and each of them to passage from the city of San Bernardino to the city of San Jacinto, paying for such tickets the customary fare; that they boarded the train at San Bernardino as passengers, entered one of the cars, and that upon entering the car and passing down the aisle to a seat plaintiff Carrie E. Nelson violently collided with and fell over a traveling bag which the defendant had negligently placed and allowed to be placed in the aisle, whereby said Carrie E. Nelson was thrown to the floor, stunned, bruised, injured, suffered a broken bone in the right ankle, and the tendons, muscles and ligaments of her right foot, ankle and leg were wrenched, twisted, bruised, sprained and torn away, and that she then and thereby suffered internal injuries and a severe nervous shock, and became and still is sick and sore, permanently injured and disabled, suffered an injury to her right knee joint, bruised, twisted, etc., the muscles, tendons and bones of the right knee, which injury brought about a condition known as water on the knee; that the injuries were caused solely by defendant's negligence; that they resulted from gross, reckless and wanton negligence of the defendant, whereby the plaintiff Carrie E. Nelson has been damaged in the sum of \$50,000.00. The answer [36] denied the negligence; denied that any injuries were caused by the Railway Company's negligence; denied reckless and wanton negligence; denied damages in any sum whatever; and alleged that Carrie E. Nelson's injuries were caused by her own carelessness and negli-

gence. The judgment [39] set forth a verdict of \$1,500.00 and entered judgment thereupon in the same sum and costs "in favor of the plaintiff" in the following language [40]:

"It is considered by the court, that A. H. Nelson and Carrie E. Nelson, plaintiffs herein, have and recover of and from The Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant herein, the sum of fifteen hundred (\$1,500.00) dollars, together with costs and disbursements of said plaintiffs in this behalf taxed at \$54 90/100."

This judgment was entered April 24, 1913 [41].

II.

The court erred in denying defendant's motion for a non-suit at the close of the plaintiffs' case [55], such motion having been made on the ground that the plaintiff had produced no competent evidence of any negligence on the part of the defendant, or of freedom from contributory negligence on the part of Mrs. Carrie E. Nelson, the plaintiff's wife. As stated above, the only evidence of negligence was the judgment roll abstracted in Specification No. 1.

III.

The court erred in refusing to direct a verdict in favor of the defendant [56].

IV.

The court erred in instructing the jury as follows [56]:

"Gentlemen of the jury, you are instructed that the judgment in the case of A. H. Nelson and Carrie E. Nelson, plaintiffs, v. Atchison, Topeka and Santa Fe

Railway Company, a corporation, defendant, No. 217-Civil, in this court, on the 24th day of April, 1913, is conclusive on the use of due care on the part of plaintiff's wife, and that the negligence of the defendant was the proximate cause of the injury to plaintiff's wife and the plaintiff, in the case now on trial, and therefore, you are instructed that your verdict must be in favor of the plaintiff in this case in some amount."

ARGUMENT.

The judgment in the former case has only the same effect as evidence in this case which that judgment would have had, had it been rendered by a court of California.

Both in the case at bar and in the case brought by the plaintiff and his wife the jurisdiction of the federal court rests solely upon the diverse citizenship of the parties.

In *Dupasseur v. Rochereau*, 21 Wall. 130, 22 L. Ed. 588, Mr. Justice Bradley discussed the subject of *res adjudicata* in the federal courts. The case came to the Supreme Court on a writ of error from the Supreme Court of the state of Louisiana, where the defendant had set up a former judgment of a United States Circuit Court. The jurisdiction of the United States Circuit Court in that former case was based solely on the citizenship of the parties, so that the jurisdiction of the United States Circuit Court had been to administer the laws of the state, and Mr. Justice Bradley said that the only effect that could be justly claimed for the judgment in the United States Circuit Court was such as would belong to judgments of the state courts rendered under similar circumstances:

“No higher sancity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in such a case under such circumstances than is due to the judgments of the state courts in a like case and under similar circumstances. If, by the laws of the state, a judgment like that rendered by the Circuit Court would have had a binding effect as against Rochereau, if it had been rendered in a state court, then it should have the same effect, being rendered by the Circuit Court.”

In *Union & Planters Bank v. Memphis*, 189 U. S. 71, 47 L. Ed. 712, the case came up on appeal from the United States Circuit Court, where the jurisdiction of the Circuit Court rested on the ground that the cause arose under the Constitution of the United States. It appeared that it was the settled rule in Tennessee that the plea of *res adjudicata* is only applicable to the taxes actually in litigation, and is not conclusive in respect to taxes assessed for other and subsequent years. The court said:

“It is enough that in Tennessee the doctrine of *res adjudicata* is not applicable to taxes for years other than those under consideration in the particular case, inasmuch as what effect a judgment of a state court shall have as *res adjudicata* is a question of state or local law, and the taxes involved in this suit are taxes for years other than those involved in the prior adjudication. * * *

“As the judgment pleaded had no force or effect in the Tennessee state courts other than as a bar to the identical taxes litigated in the suit, the courts of the United States can accord it no greater efficacy.”

The judgment pleaded in that case was a judgment of the state court of Tennessee.

In *Deposit Bank v. Board etc.*, 191 U. S. 499, 48 L. Ed. 276, Mr. Justice Day discussed the question of *res adjudicata* in a case brought by writ of error from the Court of Appeals of Kentucky, and the court quotes with approval what was said by Mr. Justice Bradley in the *Dupasseur* case.

Similar rulings have been made with respect to questions somewhat analogous, under section 721 of the Revised Statutes of the United States. Thus, although at common law a federal court has no power to order a physical examination of a plaintiff suing for a personal injury, yet, where there is a state statute authorizing such an order, the federal court must follow the state statute and order the examination.

Camden & S. R. Co. v. Satson, 177 U. S. 172,
44 L. Ed. 721.

So, also, the federal courts follow a state statute prohibiting physicians from testifying as to matters learned by them while treating their patients.

Connecticut Mut. L. Co. v. Union Transfer Co.,
112 U. S. 250, 28 L. Ed. 708.

A state statute of fraud is always followed by the federal courts.

Moses v. Bank, 149 U. S. 298, 303, 37 L. Ed.
743.

We submit that state statutes of limitations being statutes of repose are somewhat analogous to the law

of *res adjudicata*. State statutes of limitations are always followed by the federal courts.

Bauserman v. Blunt, 147 U. S. 647, 37 L. Ed. 316;

Metcalf v. Watertown, 153 U. S. 671, 38 L. Ed. 861;

Michigan etc. Bank v. Eldred, 130 U. S. 693, 32 L. Ed. 1080.

Under the law of the state of California judgment in the case brought by the plaintiff and his wife was not res adjudicata, but is res inter alios acta and was not admissible.

Section 1908, Code of Civil Procedure of California, reads as follows:

“The effect of a judgment or final order in an action or special proceeding before a court or judge of this state or of the United States having jurisdiction to pronounce the judgment or order is as follows: * * *

“2. In other cases the judgment or order is in respect to the matter directly adjudged conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding litigating the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding.”

Section 1909 reads as follows:

“Other judicial orders of a court or judge of this state or of the United States create a disputable presumption according to the matter directly determined between the same parties and their representatives and successors in interest by title subsequent to the commencement of the action

or special proceeding litigating for the same thing, under the same title, and in the same capacity.”

Section 1910 reads as follows:

“The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case *and a judgment or other determination could in that case have been made between them alone*, though other parties were joined with both or either.”

The words which we have italicised in section 1910 are perhaps not the law in any state other than California, but they have been contained in the statute law of California ever since 1872. They seem to be an attempt to state the rule as announced in *Bigelow v. Winsor*, 1 Gray 299, by Chief Justice Shaw. The commissioners appointed for the Revision and Reform of the Law of California, in their report made in 1900 with respect to the Code of Civil Procedure, on page 203, recommended that these words be struck out of section 1910, referring to *Freeman on Judgments*, section 160, where that author, without referring to the California statutes, condemns a somewhat similar statement of the rule of *res adjudicata*. Following this recommendation of the commissioners the legislature passed an act amending the Code of Civil Procedure, one of the amendments being a change of section 1910 in accordance with the recommendation of the commissioners (see Statutes 1900, pp. 244, § 470). But this blanket amendment was held invalid by the Supreme Court of the state because it contained more than one subject.

Lewis v. Dunne, 134 Cal. 291.

Since that time, many of the recommendations of the commissioners have from time to time been adopted, but no change has been made in this section. So it is evident that these words must be reckoned with as language to which particular attention has been called and which the legislature has not yet seen fit to strike out.

No judgment could have been rendered in the case of Nelson and his wife in favor of Nelson alone.

In *Matthew v. C. P. R. R. Co.*, 63 Cal. 450, an action by husband and wife for personal injuries to the wife, the court said:

“The ground of the action is the wife’s personal injuries. The cause of action is hers. The husband was joined as a plaintiff because the common law rule requiring that he do so is yet in force. *But the husband could not himself recover for the personal injuries sustained by the wife.*”

In *Baldwin v. Second Street etc. R. R. Co.*, 77 Cal. 390, an action was brought by the wife without joining the husband, but no objection was made either by demurrer or answer to a defect of parties plaintiff. On the trial the defendant moved for a non-suit on the ground that the plaintiff was a married woman. The court said that the motion was properly denied because the plaintiff was living separate and apart from her husband by reason of his desertion. Furthermore, even if the evidence failed to show desertion, the objection was waived because not raised by demurrer or answer. The court then quote from the case of *Matthew v. C. P. R. R. Co.* to the effect that the husband could not himself recover for personal injuries to the wife and adds:

“The wife in such cases is a necessary party. *No recovery can be had for such damages in an action to which she is not a party.*”

See also:

Gomez v. Scanlon, 155 Cal. 529.

In Williams v. Casebeer, 126 Cal. 77, an action for damages to a married woman on account of an action for malicious prosecution, it was urged that the judgment should have run to the wife only, but the court said that in such a case *verdict and judgment may properly be given in favor of husband and wife jointly.*

See also:

Neale v. Depot Co., 94 Cal. 425, and

Paine v. San Bernardino, 143 Cal. 654.

Although in the foregoing cases it is nowhere expressly stated that no separate judgment in favor of the husband alone may be entered in a suit brought for the wife's injuries in which he is joined as plaintiff; yet the only inference that can be drawn from these opinions is that the judgment must be joint. In other states rulings have been made squarely upon the point.

In Lindsay v. O. S. L. R. Co. (Idaho), 90 Pac. 984, action was brought for wrongful expulsion of the respondent from a passenger train. He, with his wife, who was ill, went to the station to take passage. He had a ticket for himself, boarded the train, and was ordered off. In a supplemental answer there was set up a plea of *res adjudicata*, in support of which there was offered in evidence the judgment roll in the case of Lindsay and his wife, in which a judgment had been

rendered for the defendant. That was an action to recover damages on account of the physical injury and pain and agony suffered by the wife because of the ejection of her husband from the train. It was contended that but one wrongful act was involved, and the damages being community property the plaintiff could not split his cause of action and bring one on account of damages to Mrs. Lindsay and another for his own wrongful expulsion. But the court made the following statement, which is very much in point here:

“It is made necessary by our statute for the husband to join with the wife in an action for damages for personal injuries to herself where the proceeds recovered is community property, and it is conceded that whatever could have been recovered, if anything, in that action (referring to a former action) would have been community. Section 4093, Rev. St. 1887. The wife, under that section, could not sustain her action to recover for personal injuries without joining her husband with her. This action the husband has brought on his own account for injuries sustained by himself, and the wife is not a proper party plaintiff in this action. The other action referred to, which was brought for injury to the wife, *required judgment, if any, to run to both husband and wife*, and in the case at bar the wife is not the necessary party. The wife, if she has a cause of action for personal injuries, must join her husband in the action. The husband, if he has a cause of action, need not join the wife in order to have judgment rendered in his favor. The court did not err in rejecting said judgment roll as the defendant’s *res adjudicata* was not well taken or pleaded.”

Even in New Jersey, where, by statute, in an action by husband and wife for her personal injuries the husband may add a count for his loss of services, it is

held that the verdict must find the damages on the two counts separately and that on the count for the wife's injuries a joint judgment must be entered; on the other count a separate judgment in favor of the husband alone.

Consolidated Tr. Co. v. Whelan, 37 Atl. 1106.

In Meese v. City (Wis.), 4 N. W. 406, the court said:

"It is conceded by counsel for the respective parties that the joint action by the husband and wife to recover damage for the personal injuries to the wife *abated with her death*. Such action abated at common law, and it is not saved to the husband by our statute (citing several cases). It is clear, therefore, that the action brought by the plaintiff and his wife, in which the only damages claimed were damages for personal injuries to the wife, abated absolutely at the death of the wife, *and could not be prosecuted further by the husband.*"

In Fowden v. Pac. Coast S. S. Co., 149 Cal. 151, the court said, in regard to the abatement of an action for personal injuries by the death of the plaintiff:

"It may be conceded that the rule applies to such a cause of action as is stated in the complaint herein, and that no change in the common-law rule material to such a cause of action has been made by statute in this state. See Harker v. Clark, 57 Cal. 245."

In Texas & Pacific v. Watkins, 26 S. W. 760, after the wife had been injured but before suit had been begun, the husband died and the widow brought the action for herself and as next friend of her children.

The court said:

“We are of opinion that the cause of action for the injuries received by the wife, under the circumstances set forth, not having been reduced to judgment during the life of the husband, cannot be said to have been acquired as community property, and that after his death she had the right to maintain it therefor in her own name, for her separate use. In *Nickerson v. Nickerson*, 65 Tex. 284, it is said: ‘There are circumstances in which, by the rules of the common law, the separation of the husband and wife confers on her the right to sue and be sued, and otherwise to act as a *femme sole*. If, therefore, a separation of this sort has taken place, it is plain, in legal reason, that the wife may recover, in an action for a tort, suing alone, both those damages which could be recovered in the name of the husband and wife, and in the sole name of the husband, were they living together. *A fortiori*, if, before action brought, the husband dies, or a divorce intervenes, the woman can recover the whole to her own use. 2 Bish. Mar. Wom. 276. Such a cause of action as is asserted in this case would not survive to a husband on the death of the wife, but, as the injury was personal to the wife, she could prosecute a suit after discoveriture by death or divorce, whether brought before or after that event, unless her right to do so is defeated by the matter which is contained in the second proposition insisted on by the appellant.”

Surely it cannot successfully be maintained that a separate judgment may be entered for the husband in a suit which would not survive the death of the wife, but which would survive his death.

The question must be determined on the law in force at the date of the trial.

The law of *res adjudicata* is treated in the California system of codes as part of the law of evidence. While at the date when the former action of Nelson and his wife was tried the law of California required the joinder of husband and wife as plaintiffs, yet, before the present action was tried, the law had been changed so as expressly to give the wife the right to sue alone for her personal injuries. (Laws of 1913, p. 217, Chap. 130.) This change makes the law of California accord with that of most states of the Union.

That a judgment for the wife in an action brought under the law as it now stands could not be pleaded or used in evidence in a suit by the husband for loss of her services is well settled.

Walker v. City (Pa.), 45 Atl. 657;

Womack v. City (Mo.), 100 S. W. 443.

Now, when section 1910 designates the parties between whom the former judgment may be pleaded, must it not be supposed and interpreted to speak in general terms, and in continuing terms, so as to accord with the rule that admissibility of evidence is to be determined by the state of the law at the date of the trial? And since under the law existing when this case was tried the husband would have been neither a necessary nor a proper party to the wife's action, does it not follow that the judgment was inadmissible in this case?

Upon this precise point we have been unable to find authority and submit it as a proposition of first impression. And we regard the matter as of minor importance in view of the clear application of section 1910 to the situation existing even before the amendment of 1913.

It is respectfully submitted that the judgment ought to be reversed.

Dated September 16th, 1914.

U. T. CLOTFELTER,

A. H. VAN COTT,

M. W. REED,

E. W. CAMP,

Attorneys for Plaintiff in Error.

5

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Atchison, Topeka & Santa Fe
Railroad Company, a corpora-
tion,

Plaintiff in Error,

vs.

A. H. Nelson,

Defendant in Error.

2406

BRIEF OF DEFENDANT IN ERROR.

Filed

OCT 3 - 1914

F. D. Monckton,
Clerk.

GRAY, BARKER & BOWEN,
By WHEATON A. GRAY,
Attorneys for Defendant in Error.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Atchison, Topeka & Santa Fe
Railroad Company, a corpora-
tion,

Plaintiff in Error,

vs.

A. H. Nelson,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The only question in this case arises as to the admissibility of the judgment roll of the case previously instituted by the plaintiff and his wife in the case at bar.

ARGUMENT.

For the purposes of the argument in this case, we may concede that counsel for plaintiff is correct in the position taken in his brief that "the judgment in the former case has only the same effect as evidence in this case which that judgment would have had had it been rendered by a court of California."

Assuming the truth of that statement to determine what a court of California would do with reference to the previous judgment pleaded and introduced in evidence in the case at bar, we should look not only to the statute quoted in defendant's brief, but we should look also to see what construction the California courts have placed upon those sections of the Code of Civil Procedure. In other words, we should look to see what they have done with the section and under the sections of the Code of Civil Procedure, cited, in the past to determine what they would do in the case before us. The sections of the Code applicable to the matter read as follows:

"Sec. 1908. The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

"1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.

"2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive *between the parties* and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or con-

structive, of the pendency of the action or proceeding.”

“Sec. 1909. Other judicial orders of a court or judge of this state, or of the United States, create a disputable presumption, according to the matter directly determined, between the *same parties* and their representatives or successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity.”

“Sec. 1910. The parties are deemed to be *the same* when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either.”

The Supreme Court of this state has held repeatedly that the above and foregoing three sections are but the declaration of an old common law rule governing the effect of judgments, and in view of that holding, we stoutly contend that it is immaterial whether we measure the effect of this previous judgment by what the courts of this state would do with it or by what the courts generally, following the rules of the common law throughout the United States, would do with it.

This is so because it has been declared, as we shall presently see, that the common law prevails in this state with reference to this doctrine of *res adjudicata*, and that the provisions of our Code of Civil Procedure are nothing more or less than a declaration of those common law doctrines.

In the case of

Ferrea v. Chabot, 63 Cal. 564,

after citing and quoting the three sections of the Code, 1908, 1909 and 1910, hereinabove set forth, the Supreme Court of California, speaking through Mr. Justice McKee, and concurred in by Justices Ross and McKinstry, say as follows:

“These sections of the Code are merely declaratory of the common law rule that the judgment of a court of competent jurisdiction directly upon the point is, as a plea, a bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another court.”

In the Ferrea case “nominally the parties to the two suits were not the same,” but the court goes on to discuss the question whether, within the common law rule which governed the case, by reason of its having been adopted and incorporated into the statute, the former judgment was binding on a party who was not in fact a party to the record, by reason of his interest in the controversy and the notice that he had received of the pendency of the suit, the court finally conceding that under the authorities cited, one being the case of *Miner v. Clark*, 15 Wend. 125, that so far as the question of parties was concerned in the case, the relation of the party not named in the suit at all was such to the case as to bind him by the judgment and that he was concluded from questioning the matter determined therein; at the same time, the court holding that for the reason that the same contracts were not involved in the several suits the former judgment was not *res adjudicata* in the later case. The decision deals almost exclusively

with the question of *res adjudicata*, and in it the court cites the cases of Davis v. Brown, 94 U. S. 423, and Russell v. Place, 94 U. S. 606, which illustrate and show that the doctrine of *res adjudicata* as laid down in this state by its supreme tribunal are the same as those announced by the federal courts as being derived from the doctrines of the common law.

We next cite to the court the case of

Lamb v. Wahlenmaier, 144 Cal. 91.

This was an action brought upon a contractor's bond against the contractor and his surety to recover the amount paid by the plaintiff in discharge of liens in excess of the contract price for constructing the building. The defendants in the case pleaded the judgment in a previous action brought alone by Wahlenmaier against Lamb to recover under their contract in which the same questions were litigated, as in the case of Lamb v. Wahlenmaier, and his surety, but as clearly appears, the surety was not a nominal party to the former suit. We quote from the opinion in the Lamb case:

"The defendants herein have pleaded the judgment in that action in bar of the plaintiff's right of recovery. The Superior Court held that it was a bar in favor of Wahlenmaier, but not in favor of the surety company, and rendered judgment against the latter and in favor of the plaintiff for \$691. The surety company has appealed.

"The rule formulated by Lord Chief Justice De Grey in the Duchess of Kingston's case, and frequently repeated in other cases, that 'The judgment of a court of concurrent jurisdiction directly

upon a point is, as a plea, a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another court,' has been substantially reproduced in section 1908 (subd. 2) of the Code of Civil Procedure of this state. The estoppel thus created is not limited to an action which is identical in form with the former action, or where the same parties are plaintiff and defendant in each of the actions, but may be invoked whenever, in the second action, the parties are in privity with the parties to the first action and the same issue is presented for determination which was determined in the former action. As between the parties to the action, the judgment therein is an estoppel as to all matters which are actually and necessarily included in the judgment. (Code Civ. Proc., Sec. 1911.)"

It will be seen that the court in the above quotation construes the word "parties," as used in the statute, to mean not only the nominal parties to the record, but also to include all parties who are in privity with the nominal parties to the first action, and while the surety was not a party to the first action in name at all, he was in privity with one of the parties to that action, and therefore bound by it, and the judgment therein was *res adjudicata* as to him, as well as to the nominal parties. It was plain in the above case that judgment could not have gone either for or against the surety in the first case, because he was not a party to that suit, and if section 1910 had been given by the Supreme Court of this state the narrow construction which counsel for plaintiff in error seeks to give it, in his brief, the case of *Lamb v. Wahlenmaier* would have

been decided the other way. The force and effect of the decision in the Lamb case is that the parties in both cases were substantially the same because an actual party to the suit represented the interest of his surety in the former action, and anything that bound the principal by reason of the privity between the principal and the surety, also bound the surety, and was *res adjudicata* both as to the principal and as to the surety. The Duchess of Kingston's case, and the rule declared therein was unquestionably the common law rule governing the proposition of *res adjudicata*, and when the court says that the rule therein laid down "has been substantially reproduced in section 1908 (subd. 2) of the Code of Civil Procedure of this state," it means to say that the common law rule has been enacted into the statutes of this state.

We next call the court's attention to the case of
Cook v. Rice, 91 Cal. 664,

in which it was held, quoting from the head-note:

"In an action against a husband and wife to recover damages for an alleged trespass upon public land in the possession of the plaintiff, claiming as a pre-emptioner and to enjoin future trespasses, where the answer of the defendants alleged that the wife claimed no interest in the land, and that her acts were those of a member of the family of the husband, and in privity with his title, it is proper to admit in evidence on behalf of the defendants the judgment roll in a former action of ejectment by the plaintiff against the husband, wherein it was adjudged that the plaintiff was entitled to the possession only of a small inclosure

of ten acres not trespassed upon by the defendants, and that the plaintiff was not possessed or entitled to the possession of any part of the land entered upon by the defendants, the two actions being substantially between the same parties.”

It will be seen, if not from this head-note, from an examination of the case, that the wife was not a party named at all to the first action. The same objection, in substance, was made in the case that is made here, to-wit, that the wife was not a party to the first action (here it is that she is not a party to the second action), and therefore a judgment could not have been rendered therein, either for or against her, and therefore she was not bound by the judgment under the provisions of our code, which has been in effect ever since 1872 just as it now exists. The opinion in the *Cook v. Rice* case was written by Judge Temple, then acting as commissioner in 1891. We quote further from his opinion as follows:

“2. It was objected that it was not between the same parties. Substantially, it was between the same parties. Mrs. Rice made no claim to the land, and all she did was under the claim of her husband. Had she, by her acts, taken possession, the right, if any, thus acquired would have been common property, and the right to control and manage in her husband.”

Thus we see that the doctrine of privity is kept in view in the determination of this case. The wife was in privity with the husband by reason of their community interest in the property. It was community property. Therefore, though she was not a party to

the first action at all, literally speaking, yet she was a party by reason of her privity with her husband and therefore the judgment could be used as evidence in her favor or as an estoppel against any party to the record, either nominal or by privity. Judge Temple in the case last cited, puts his statement that the parties were substantially the same squarely upon the ground that the property in controversy in both suits was common or community property of the husband and wife.

In the case at bar, in both the suits, the recovery, as has been held by our Supreme Court in numerous cases, is community property. In the first suit the wife recovered for the pain and inconvenience she suffered by reason of her personal injuries and the proceeds of that kind of a suit are held to be community property in the following cases:

McFadden v. Santa Ana R. Co., 87 Cal. 464;

Lamb v. Harbaugh, 105 Cal. 680.

The McFadden case was an action for damages alleged to have been sustained by a personal injury to the wife alone, through the negligence of the defendant. The husband was joined with the wife as a plaintiff in the action. We quote from the opinion as follows:

“The right to recover damages for a personal injury, as well as the money recovered as damages, is property, and may be regarded as a chose in action (Chicago etc. R. R. Co. v. Dunn, 52 Ill. 260, 4 Am. Rep. 606; Anderson’s Law Dict.); and if this right to damages is acquired by the wife during marriage, it, like the damages when re-

covered in money, is, in this state, community property of the husband and wife (Civ. Code, Secs. 162-164, 169), of which the husband has the management, control, and absolute power of disposition other than testamentary.”

We also quote from the opinion of the court in bank delivered by Mr. Justice Harrison in the *Lamb v. Harbaugh* case, cited above:

“Whatever may be the law in other states, in this state the separate property of the wife which is acquired by her after marriage is limited to such as she acquires by gift, bequest, devise and descent. If a right of action for damages for a personal injury is not acquired by either of these modes it is a part of the ‘other property acquired after marriage’ and is therefore community property.”

The case of

Martin v. S. P. Co., 130 Cal. 285,

was a suit by the plaintiff for loss of services of his wife and it was alleged in the complaint in the action as follows:

“That by reason of the negligence of the defendant the injuries received by plaintiff’s wife were permanent and rendered her wholly unable to perform her usual work and duties, and that by reason thereof he has been, and will be, through the remainder of her life, deprived of her services and compelled to provide medical aid and care for her. Judgment was rendered in favor of the plaintiff.”

We quote further from the opinion of the court:

“The right of the plaintiff to maintain the action does not depend upon the right of the husband to

compel the wife to render such services or upon the existence of any obligation upon her part to perform them, other than the obligation of mutual support which they contract toward each other (Civ. Code, Sec. 155). The action is brought to recover compensation for the damages sustained by the wrongful act of the defendant whereby the plaintiff has been deprived of her services and compelled to expend money as a consequence of such deprivation. The services of the wife are a part of the earning power of the community, and the earnings received for her services constitute community property as much as do the earnings received for the services of the husband. If the injury had been received by the husband it would not have been contended that he could not recover for the damage sustained by the loss of his earning capacity. In her case the earnings would be community property, and any act by which either husband or wife is deprived of the capacity to render services, diminishes the capacity to accumulate community property. * * * The husband as the head of the community has the right to maintain actions for damage to property sustained by the community."

It is clear, therefore, that in the action at bar though the wife is not a party to it, she has her community interest in the recovery and while she is not a nominal party, she is, by reason of her privity with her husband, by reason of her interest in the community property to be recovered, an actual party to the suit, or, as is said by Judge Temple in a case previously decided, the parties in this last suit are substantially the same as they were in the first suit, by reason of the fact that community

property is and was involved in both of these actions; and the fact that the law requires that both the husband and wife shall be parties to the former action, and only the husband shall be plaintiff in the last action brought to recover for loss of services, in no way affects the substantial results of the litigation. It is a mere artificial requirement in procedure, the judgments in both instances having the same affect upon identically the same parties, and identically the same interests. The courts of this state look past the nominal parties and see only the parties in interest.

The case of

Lindsey v. Danville, 46 Vt. 144,

is an action for loss of services and expense of medical attendance on a wife, and is exactly on all fours with the case at bar, not only as to the facts involved, but also as to the law of *res adjudicata* therein laid down. We therefore quote the opinion in the case in full:

“The opinion of the court was delivered by Redfield, J. The plaintiff and wife, in a joint action, had recovered final judgment against the defendant town, for personal injury to the wife, by reason of the insufficiency of the highway which it was incumbent on the defendant to keep in repair. This suit is brought to recover damages that accrued to the husband by reason of the same occurrence. The same facts must be proved in this case, as in the former, to warrant a recovery by this plaintiff. The sufficiency of the highway, the care and prudence of the plaintiff's wife in the management of the team, the condition and safety of the wagon and tackle, are in issue in this case

precisely as in that. The defendant has had full opportunity to adduce evidence, and cross-examine the plaintiff's witnesses, upon these issues, which have been adjudicated. Is the defendant concluded, as to these issues, by the former judgment? The identity of the issues and subject-matter of the two suits, is not questioned. Nor is it denied that facts once judicially determined between the same parties, are concluded. In the language of Lord Ellenborough, in the leading case of *Outram v. Morewood et ux.*, 3 East 346: 'The estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them.' In that case the defendant's wife, Ellen, had been sued for digging coals in the plaintiff's mine; the wife had justified her acts, under a claim of right in the coal mine, which had been determined against her. She afterwards intermarried with the defendant Morewood, and continued to dig and remove the coal from plaintiff's mine; and the plaintiff brought a second suit against husband and wife, who attempted to set up the same right and title, as in the former suit, and the court held that both defendants were estopped. The case was elaborately argued by Erskine on the one side, and by Gibbs on the other, and the chief justice brought to his service his great learning and judicial vigor, in a thorough analysis of all the authorities on the subject of estoppel, and seems to have had no doubt, that if the wife was estopped by the former judgment against her, the husband would be estopped also.

“The case of Incledon *et al.* v. Burgess, reported in 1 Show. 27, was an action of trespass for breaking a close. Plea, a prescriptive right of common of turbary, etc.; replication, traversing such prescription. Rejoinder, by way of estoppel, was, that in such a term, one of the plaintiffs brought an action of trespass against the defendant, wherein he pleaded the same prescription, and issue tried upon it, and found for the defendant. The question was made in argument, that the estoppel should not prevail, because another plaintiff was joined in the former suit. Lord Holt, who gave the opinion of the court, is reported to have said: ‘An estoppel upon a verdict goes a great way; but if one man is estopped, and he joins another with him, whether this shall avoid the estoppel, is a quere.’ But his lordship gave no opinion upon the estoppel; but disposed of the case upon a defect in the declaration. The averment in the declaration was, ‘*Contra pacem domini regis*’; and the court held that the averment should have been ‘against the peace of both kings’; it being in the reign of William and Mary. Lord Ellenborough reviews the authorities cited by Lord Holt, and somewhat criticises his disposition of the case on such technicality, and avoiding the merits of the plea. He evidently thought the estoppel should have prevailed. In *Outram v. Morewood*, the court say:

“‘If the wife were bound by this finding, as an estoppel, and precluded from averring the contrary of what was then found, the husband, in respect of his privity, either in estate or in law, would be equally bound.’ 2 Smith Lead. Cas. 662-822. *Hawkins v. Lambert*, 18 B. Mon. 99. But in this case the husband and wife had impleaded the de-

fendant in a joint action, and recovered. Had the defendant town recovered final judgment in the first suit, against both plaintiff and his wife, and then the plaintiff should have instituted this suit, and sought to try precisely the same issues in which he had been once cast, would the defendant have deemed it a duty to marshall the same evidence in defense, and try again the same issues that had been once finally determined? If the husband would be concluded by an adjudication against the wife, in which he had no part, a *fortiori* he would be concluded by a judgment to which he was party, and had full opportunity to adduce evidence, and cross-examine the witnesses of his adversary. In the case of *Spencer et al. v. Dearth*, 43 Vt. 98, the court held that an award between the payee and surety of a note, in which the note was adjudged to be paid, was conclusive in a suit between the payee and the principal in the note; though it was conceded that, had the judgment been the other way, the principal would not have been concluded. Ordinarily, estoppel must be mutual, and conclude both parties, and that case was held an exception. But in this case there is no want of mutuality, and both parties would be alike concluded. We find no error in this branch of this case."

The above case, as will be observed from the citations contained in it, is based and founded on the common law doctrine of *res adjudicata*, and inasmuch as it has been declared over and over again by the Supreme Court of the state of California, as we have already seen, that the three sections of our Civil Code of Procedure, quoted in the briefs in this case, are but

a declaration of the common law rule, the above case should be regarded as an announcement of the law, as it is, and should be recognized and enforced in the courts of the state of California, including the federal courts of this state.

As further proof that the courts of this state have recognized the common law rule as being the rule of action in this state, we quote from the head-note of the case of

Reed v. Cross, 116 Cal. 473.

“A judgment or decree necessarily affirming the existence of any fact, is conclusive upon the parties, or their privies, whenever the existence of that fact is again in issue between them, not only when the subject matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court, except on appeal, or other proceeding provided for its revision.”

We quote also from the opinion of the court in bank, written by Mr. Justice Harrison, in the case of

Wolverton v. Baker, 98 Cal. 632.

“The plea of *res judicata*, applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

A very good statement of the common law rule applicable to this case may be found in the opinion by Mr. Justice Harlan in the case of

S. P. R. Co. v. U. S., 168 U. S. at page 48,
from which we quote:

“The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so declared, must, as between the same parties, or their privies, be taken as conclusively estopped so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if as between parties and their privies conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.”

See also upon this same subject:

New Orleans v. City Bank, 167 U. S. 371;

Freeman v. Barnum, 131 Cal. 386;

Nickerson v. Cal., 10 Cal. 520;

Bingham v. Kerney, 136 Cal. 175.

While it was necessary under our practice, to begin two separate actions for the injuries complained of (see *Tell v. Gibson*, 66 Cal. 246), yet not only do all of the authorities above cited to that proposition show that the subject of the action in both cases was community property, in which both the husband and wife had an interest, but the statute of this state itself declares the amount recovered in both of these cases to be community property.

Section 172 of the California Civil Code provides:

“The husband has the management and control of the community property with a like absolute power of disposition, other than testamentary, as he has of his separate estate.”

Section 162 of the California Civil Code provides:

“All property of the wife owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent with the rents, issues and profits thereof, is her separate property.”

The next section defines the separate property of the husband in almost the exact language of section 162, and following that, section 164 of the California Civil Code provides:

“All other property acquired after marriage by either husband or wife, or both, is community property.”

And, as has been held by the decisions of the Supreme Court of this state, already hereinbefore cited, the recovery in personal injury suits by husband or wife, or by both, after marriage, is community property under the provisions of these sections.

Authorities Cited by Plaintiff in Error.

In plaintiff's brief there is but one case cited which seems at all applicable to the question here involved. That is the case of *Lindsey v. O. S. L. R. Co.*, 90 Pac. 984, an Idaho case. The court in that state seems to be composed of three judges, only two of which concur in the opinion. An examination of the opinion, so far as it relates to the subject of *res adjudicata*, discloses that the question is not very thoroughly considered. No authority whatever is cited in support of the decision, and while it appears from the decision that the recovery had by a wife in the state of ~~Oregon~~^{Idaho} for the pain and injury she suffered is, under the law of that state, community property, it does not appear from the opinion whether the recovery by the husband for loss of services would be treated as community property or not. As to what the rule is as to this last proposition, in Idaho, we are left in the dark, but whatever it may be, the case is at all events at right angles with the decision of the court in this state, as announced by Judge Temple in the case of *Cook v. Rice*, 91 Cal. 664, and also in other California cases hereinabove cited. It is also at right angles with the common law rule laid down in the Vermont case, hereinabove quoted, which common law rule has been declared in this state by its supreme tribunal over and over again to be the true statutory rule in this state.

As to the cases cited by plaintiff of

Walker v. City, 45 Atl. 657,

a Pennsylvania case, and

Womach v. City, 100 S. W. 443,

a Missouri case, it appears in both of those cases that under the law of both of those states, Pennsylvania and Missouri, recovery for the personal injuries of the wife is the separate property of the wife in the one instance, and in the other, where the recovery is by the husband for the loss of her services, the recovery is the separate property of the husband.

We quote from the opinion in the Walker case, which is a Pennsylvania case:

“The right of the wife in the first action being for a tort done to her was her separate property by the express words of the Act of June 3, 1887.”

We quote from the opinion in the Womach case, as follows:

“The term privity means mutual or successive relationship to the same rights of property.”

And again:

“In the present condition of our statutory law, the ownership of the proceeds of a judgment in favor of the wife no longer remains as at common law. There such damages belonged to the husband when recovered by judgment in a joint action with his wife. But in our day they belong to the wife alone, so runs the written law. R. S. 1899, Sec. 4340, which provides that * * * ‘Any personal property including rights in action belonging to any woman * * * or has grown out

of any violation of her personal rights shall, together with all income, increase and profits thereof, be and remain her separate property and under her sole control and shall not be liable to be taken by any process of law for the debts of her husband.' That section also provides that she may sue in her own name without joining her husband."

In both of these cases, the Pennsylvania and the Missouri case as well, it is pointed out that the husband was not a necessary party to the first action, but the real ground and reason for the decision is that the husband had no interest in the results of the first action, and therefore there was no privity of interest between the husband and wife in the action; but in this state, as well after the rule was changed by the amendment of 1913, permitting the wife to bring an action with or without her husband for her own pain and suffering, as also before that amendment, there was, and still is, a privity of ownership between the husband and wife in the recovery for the wife's pain and suffering, as well as for the loss of her services, because the statute defining separate and community property was not amended at any time since the decisions of the Supreme Court hereinabove cited.

In an endeavor to have the statutes of this state construed narrowly and according to their letter rather than liberally, and in accordance with their substance and effect, counsel for plaintiff calls particular attention to section 1910 of our Code of Civil Procedure, and the words "between them alone" and would construe those words to mean as applied to this case that

because a judgment in the original suit could not have been rendered against the husband alone, but must have been a joint judgment in favor of the wife and husband together, therefore the statute precludes the introduction of such judgment here in evidence. As was well said in the court below by Judge Wellborn upon the argument of the demurrer to the supplemental complaint, the statute on its face will bear no such construction. The reasons given by the learned trial judge for the statement of this view are substantially as follows, as the author of this brief remembers them:

It will be noted that in section 1908 of the Code of Civil Procedure, quoted near the beginning of this brief, the language is "in other cases the judgment or order is in respect to the matter directly adjudicated, conclusive *between the parties.*" Note the expression "*the parties.*" In section 1909 the language of the section is "other jurisdictional orders of the court or judge of this state, or of the United States, create a disputable presumption according to the matter directly determined between *the same parties.*" Note the expression in this section "*the same parties,*" and compare it with the expression "the parties" in the preceding section. Now comes section 1910, following immediately upon section 1909, in which the language is "the parties are deemed to be the same," etc. The expression "the same," used in 1910, is confined to 1909, and is not found in section 1908 at all, so the learned judge in the court below said, that under the most literal construction of the law, section 1910 did not mean to qualify or define the expression "the

parties," contained in section 1908, but it did mean to qualify only the expression "the same parties," contained in 1909. Arguing that if it had intended to qualify "the parties," leaving out the word "same," it would have used the same or similar expression contained in section 1908, so therefore, if counsel desires to be literal in his construction, this construction, placed upon the statute by the learned judge of the court below, literal though it be, removes from under his feet the only ground upon which he attempts to stand, to-wit, the literal construction of the statute. The writer of this brief deems the theory enunciated as to the construction of the statutes by the learned judge of the court below, to be perfectly sound and reasonable, and for that reason incorporates it here.

Another thing we would suggest: What does the expression "between them alone" mean? Is it singular in its nature or is it plural? The word "them" would seem to be plural; the word "alone" would seem to be singular. The two words taken together, "them alone" would seem to be plural. How many is included then in the plural expression? Does it mean to include two parties, or does it mean to include three parties or four parties? Does it, as applied to the case in hand, by its literal interpretation, mean to say that in the former suit, in order to make it available in the later suit, the court must have had the power in such former suit to render a several judgment in favor of the husband alone and against the defendant, or does it mean in order to make the former judgment available in the second case that all that was necessary was

for the court to have been able to pronounce judgment in that case in favor of both the plaintiffs and against the defendant? From the words which follow the word "alone" it would seem that this latter theory is the case, because the statute says: "Though other parties were joined with both or either." If at first blush this word "alone" is to stand by itself unqualified, and if it signifies the singular and not the plural, if it shall be taken to mean, standing alone, that the judgment in the former case must have been in favor of the husband alone, in order to be available in the second case, still there is a section of the same code in which this section is found which qualifies and extends its meaning "for the purpose of promoting justice," if we find it necessary to resort to that section. We allude to section 17 of the Code of Civil Procedure of the state of California, which provides that:

"Words used in this code in the present tense include the future as well as the present. * * * The singular includes the plural and the plural the singular."

We submit that in the numerous decisions of the Supreme Court of the state of California that we have cited, showing that these three sections of our Code of Civil Procedure only announce the common law doctrine that judgments are binding not only upon the nominal parties, but on all parties in privity with the nominal parties, in each and all of these decisions of our Supreme Court they have necessarily construed this section 1910 as applicable only to the provisions of 1909, and not at all applicable or in any way qualifying

the provisions of 1908, contained in the second subdivision thereof. The Supreme Court has so decided because the word "alone" and its relation and position in section 1910, and the relation which it bears to section 1909, and 1908, warrants the same construction placed upon it by the learned judge of the lower court.

We respectfully submit that the judgment of the court below should be affirmed, because the plaintiffs, being in privity in both cases, are substantially the same in both cases.

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United States
Circuit Court of Appeals
For the Ninth Circuit.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Plaintiff in Error,

VS.

CHARLES J. SCHLEIF,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Western District of Washington,
Northern Division,

Filed

JUL - 1 1914

F. D. Monckton,
Clerk.

No. 2407

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PUGET SOUND TRACTION, LIGHT & POWER
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Northern Division.

Index.	Page
Motion for a Directed Verdict.....	186
Names and Addresses of Counsel.....	1
Order Allowing Bill of Exceptions.....	207
Order Allowing Writ of Error.....	215
Order Denying Motion for New Trial.....	28
Order Directing Certification of Certain Original Exhibits.....	220
Order Extending Time to File Bill of Exceptions.....	30
Petition for New Trial.....	17
Petition for Writ of Error.....	213
Plaintiff's Testimony in Rebuttal.....	185
Praecipe for Entry of Appearance of Attorneys for Plaintiff in Error.....	238
Praecipe for Transcript of Record.....	221
Proceedings Had January 9, 1914, 10 A. M.....	143
Proceedings Had January 9, 1914, 2 P. M.....	186
Proof of Service.....	219
Reply.....	12
Statement of Facts, Defendant's Proposed.....	35
Statement of Record to Be Printed.....	235
Stipulation Extending Time to File Bill of Exceptions.....	30
TESTIMONY ON BEHALF OF PLAINTIFF:	
HANSON, MIKE.....	134
Cross-examination....	135
HORSFALL, DR. FRANK L.....	88
Cross-examination	95
Redirect Examination.....	97

	Index.	Page
TESTIMONY ON BEHALF OF PLAIN-		
TIFF—Continued:		
JONES, DR. EVERETT O.....		106
Cross-examination		111
KROGH, ———.....		136
KROON, JOHN.....		113
Cross-examination		119
KUMPF, ———		121
Cross-examination....		129
Redirect Examination....		132
McKINNEY, DR. M. W.....		36
Cross-examination.....		41
Redirect Examination.....		52
SCHLIEF, CHARLES J.....		54
Cross-examination		70
Redirect Examination..		83
Recross-examination		85
Re-redirect Examination..		87
Recalled		141
Recalled in Rebuttal.....		185
SNIVELY, DR. J. H.....		98
Cross-examination ..		100
Redirect Examination		104
Recross-examination		105
TESTIMONY ON BEHALF OF DEFEND-		
ANT:		
DAVIDSON, O.....		181
Cross-examination		183
Redirect Examination....		184
ELMORE, DR. BRUCE.....		162
Cross-examination		165
Redirect Examination..		167

	Index.	Page
TESTIMONY ON BEHALF OF DEFEND-		
ANT—Continued:		
Recalled—Cross-examination		169
Redirect Examination		170
HIGLEY, R. R.		178
NELSON, R. B.		170
Cross-examination		171
THOMPSON, DR. H. B.		145
Cross-examination		155
Redirect Examination.		160
Cross-examination (Resumed)		160
Redirect Examination.		161
Recalled		168
WARD, R. E.		174
Cross-examination		175
Verdict		14
Writ of Error (Copy)		225
Writ of Error (Original)		230

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

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and Plaintiff in Error, Room 403 Electric Build-
ing, Seattle, Washington.

A. J. FALKNOR, Esq., Attorney for Defendant and
Plaintiff in Error, Room 403 Electric Building,
Seattle, Washington.

GEORGE D. EMERY, Esq., Attorney for Plaintiff
and Defendant in Error, 422 Central Building,
Seattle, Washington. [1*]

*In the Superior Court of the State of Washington,
for King County.*

No. 94,440.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

*Page-number appearing at foot of page of original certified Record.

Complaint.

For complaint herein the above-named plaintiff alleges:

I.

That the defendant is and at all times hereinafter mentioned was a corporation engaged in the business of operating an electric street-car system in the city of Seattle.

II.

That in its business aforesaid the said defendant operated a line of such cars upon and along the public thoroughfare in said city known as Fourteenth Avenue Northeast, and was so operating such cars on the 23d day of January, 1913. That at that time the east one-half of said Fourteenth Avenue, from a point one block south to a point one block north of Fifty-fifth Street, was in an unfinished condition and was being paved and certain public improvements, to wit, water-pipes were being laid therein by the city. That at a point on Fourteenth Avenue N. E. on the south side of Fifty-fifth Street, between the center of said avenue and the east curb line, there was an excavation, circular in form and about six feet in diameter and four feet deep, made by the city for the purpose of constructing therein a water gate in connection with the underground water-pipe then forming a part of its water system; that said excavation extended within about one foot of the east rail of the line [2] of street railway there operated by the defendant.

III.

That this plaintiff was then in the employ of Krough & Jesson, contractors of the city, and was engaged in assisting in the building of the said manhole at and in the excavation aforesaid, and was employed to pass the brick used in such construction from the surface of the street to the mason engaged in the excavation in building said wall.

IV.

That in the course of that employment it was necessary and customary for the plaintiff to be near and frequently to go and to be upon the east track of the said street railway then being so operated by the defendant, which the defendant and its servants then well knew; that said point was in plain view of persons operating defendant's cars approaching from the south for a distance of more than six hundred feet; that it was the duty of defendant in there operating its said cars to give suitable warning of the approach of such cars to said point by ringing a bell or gong, or sounding a whistle, or otherwise suitably warning persons there being of the approach of its cars, and it was the further duty of the defendant to cause its cars to run slowly at said point and to approach the same under complete control, and to avoid accident and injury to persons necessarily there being engaged in such work.

V.

That the defendant on said day at or about the hour of 10:00 A. M. was operating one of its said cars upon and along said street railway, traveling northward at a high rate of speed, to wit, fifteen miles

per hour, to and at the point where said excavation existed, and where said manhole was being constructed, and while the plaintiff was then and there employed as aforesaid; [3] that in so doing the defendant negligently operated and run its said car in this, that it failed and neglected to cause any signal or warning to be sounded by gong, bell, or otherwise, of the approach of its said car to the point aforesaid, and that it negligently caused said car to approach said point at a high rate of speed, to wit, fifteen miles per hour; and failed and neglected to cause the same to slow up upon approaching said point, or to be under control.

VI.

That while this plaintiff was then and there so employed, relying upon the duty of the defendant aforesaid, and its performance thereof, and while his attention was necessarily closely engaged in and fixed upon his said work of passing bricks, as aforesaid, the said defendant so negligently as aforesaid, operated its said car on and along said street railway, at a high rate of speed, to wit, 15 miles per hour, and without warning, as to cause the same to run against and strike the plaintiff, breaking his left leg and two of his ribs, throwing him to the ground and otherwise bruising, breaking, wounding and injuring the plaintiff, and putting him in great peril and pain, and inflicting serious and permanent bodily injury upon him, without fault on his part, to his damage in the sum of Ten Thousand (\$10,000) Dollars.

VII.

That plaintiff was compelled to and did lose all his time since the said accident, and will be compelled to

lose the same for a period of six months yet to come on account of said injuries to his further injury in the sum of Five Hundred (\$500.00) Dollars.

VIII.

That plaintiff was thereby compelled to and did pay out and expend the sum of One Hundred Fifty (\$150.00) Dollars, for hospital [4] fees, nursing and medical and surgical aid and treatment, and will be compelled to pay out and expend as much more for said purpose to his further damage of Three Hundred (\$300.00) Dollars.

IX.

That this plaintiff was then a man of forty-three years of age, of sound body and good physical health, and a carpenter by trade, but was then working as a mason's assistant, as aforesaid, and was earning an average of Three (\$3.00) Dollars per day, and was capable of earning Five (\$5.00) Dollars per day at his trade.

X.

That the scene of said accident was and is within a thickly settled residential section of said city, and the defendant is and was there forbidden to run its said cars at a greater speed than twelve miles per hour in accordance with the provisions of its franchise, to wit, Ordinance No. 5874 of the City of Seattle, entitled "An Ordinance granting to J. D. Lowman and Jacob Furth, their successors and assigns, a franchise to construct, maintain and operate Street railways in the City of Seattle," under which ordinance defendant was then and there so operating its said cars.

WHEREFORE, plaintiff demands judgment against the said defendant in the sum of Ten Thousand Eight Hundred Dollars (\$10,800.00), together with his costs and disbursements herein.

GATES & EMERY,
Attorneys for Plaintiff.

Office and Postoffice Address:

422-24 Central Bldg., Seattle, Wash.

State of Washington,
County of King,—ss.

Charles J. Schleif, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above-entitled action, that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

C. J. SCHLIEF. [5]

Subscribed and sworn to before me this 1st day of May, A. D. 1913.

[Seal]

GEO. D. EMERY,
Notary Public in and for the State of Washington,
Residing at Seattle.

Filed in Clerk's Office May 17, 1913. W. K. Sickels, Clerk. By G. A. Grant, Deputy.

Filed in the U. S. District Court, Western Dist. of Washington. Jun. 28, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [5½]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Answer.

Comes now the defendant and for answer to the complaint of the plaintiff, alleges:

I.

For answer to the allegation of paragraph I of plaintiff's complaint, this defendant admits the same.

II.

For answer to the allegations of paragraph II of plaintiff's complaint, this defendant admits that in its business aforesaid, the said defendant operated a line of such cars along and upon said thoroughfare in said city, known as Fourteenth Avenue, Northeast, and was so operating said cars on the 23d day of January, 1913, and that certain improvement was being made on said Fourteenth Avenue Northeast at or near Fifty-fifth Street. But as to the other things therein alleged, this defendant denies any knowledge or information thereof sufficient to form a belief.

III.

For answer to the allegations of paragraph III of

plaintiff's complaint, this defendant admits that the plaintiff was in the employ of Krough and Jesson, contractors of the city, and was engaged, with others, building a manhole at or near [6] Fourteenth Avenue Northeast and Fifty-fifth Street; but denies any knowledge or information sufficient to form a belief as to the other allegations of said paragraph.

IV.

For answer to the allegations of paragraph IV of plaintiff's complaint, this defendant denies the same.

V.

For answer to the allegations of paragraph V of plaintiff's complaint, this defendant denies the same.

VI.

For answer to the allegations of paragraph VI of plaintiff's complaint, this defendant denies the same, and particularly denies that the plaintiff has been damaged in the sum of Ten Thousand Dollars (\$10,000.00), or in any other sum, or at all.

VII.

For answer to the allegations of paragraph VII of plaintiff's complaint, this defendant denies the same.

VIII.

For answer to the allegations of paragraph VIII of plaintiff's complaint, this defendant denies the same.

IX.

For answer to the allegations of paragraph IX of plaintiff's complaint, this defendant denies any knowledge or information thereof sufficient to form a belief.

X.

For answer to the allegations of paragraph X of

plaintiff's complaint, this defendant admits that said place was within the settled residential district of the city, and that the defendant was operating the cars at said place under said Ordinance No. 5874, and that said ordinance provides that:

“The rate of speed at which cars may be run within [7] the business and settled residential sections of the City shall not exceed twelve miles an hour, and shall be subject to regulation and control by the City Council by ordinance. In case of wilful violation of any ordinance passed in pursuance hereof, the owner or owners of this grant shall be subject to a penalty of one hundred (100) dollars for each violation, said penalty to be recovered by the City of Seattle in a civil action.”

But denies each and every other allegation therein contained.

For a further answer and first affirmative defense, this defendant alleges: That whatever injuries, if any, the plaintiff received, were caused and contributed to by his own careless acts and negligence.

For a further answer and second affirmative defense, this defendant alleges: That the plaintiff at the time and place in question was employed by a contractor of and with the City of Seattle in the performance of extra-hazardous work, to wit, in the construction of a manhole in and upon one of the streets of said city, and that the work in which the plaintiff was engaged at the time and place in question was of the extra-hazardous kind covered and included under Chapter 74, Laws of 1911 of the State

of Washington, page 345, relating to compensation of injured workmen; and that whatever injuries, if any, plaintiff received, were received at a time when he was engaged in the employment of an employer carrying on and conducting one of the industries scheduled and classified under such law, and at the plant of such employer, and subject to the provisions of such law; and that, thereafter, to wit, on the 25th day of January, 1913, the plaintiff herein caused to be filed a Workman's Claim for Compensation with the Industrial Insurance Commission of the State of Washington being Claim No. 16,531; and, thereafter, the said Industrial Insurance Commission of the State [8] of Washington awarded the plaintiff herein compensation for the month ending February 23, 1913, of \$30.00, and also for the month ending March 23, 1913, of \$30.00.

Wherefore, this defendant prays that this action be dismissed and that it recover its costs and disbursements herein.

JAMES B. HOWE,
A. J. FALKNOR,
Attorneys for Defendant.

State of Washington,
County of King,—ss.

A. L. Kempster, being first duly sworn, on oath deposes and says: That he is the Manager of the Puget Sound Traction, Light & Power Company, a corporation, defendant in the above-entitled action; that he has read the foregoing Answer, knows the contents thereof and believes the same to be true. That he makes this verification because defendant

is a corporation and affiant is its manager.

A. L. KEMPSTER.

Subscribed and sworn to before me this 10th day of July, 1913.

R. E. SHARPE,

Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within Answer received and service acknowledged this 10th day of July, 1913.

GATES & EMERY,

Attorneys for Plaintiff.

TO WHOM IT MAY CONCERN:

Notice is hereby given that service of all subsequent papers in the within named action except writs and process, may be made upon defendant by serving the same upon James B. Howe and A. J. Falknor, as attorneys for defendant, at No. 403 Electric [9] Building, Seattle, Washington.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Defendant.

[Endorsed]: Answer. Filed in the U. S. District Court, Western Dist. of Washington. July 10, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.
[10]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT and
POWER COMPANY, a Corporation,
Defendant.

Reply.

For reply to the answer of the defendant herein,
the plaintiff alleges:

I.

As to the first affirmative defense in the answer
contained;

He denies the same and every allegation matter
and thing therein.

II.

As to the second affirmative defense in said answer
contained;

He admits that he was, at the time and place in
question, employed by a contractor of and with the
city of Seattle, in the construction of a manhole in
and upon one of the streets of said city.

He denies that the injuries complained of were re-
ceived or inflicted upon him at the plant of his em-
ployer or by or through the acts or negligence of his
employer or any of his servants or employees or by
any servants or employees of the city of Seattle.

He denies that said injuries were subject to adjustment or compensation under the Workmen's Compensation Act but alleges that said injuries were inflicted by and arose from the negligence and wrong of another not in the same employment and were received by plaintiff away from and not in or at the plant of his employer and that, if the same were in any way subject to compensation under said [11] act, the plaintiff was entitled to elect and has duly elected not to take under said act but to rely upon his action at law; and that due notice of such election has been given prior to this action to all persons entitled thereto.

Save as above specifically admitted or denied, he denies the allegations of said second affirmative defense and every part thereof.

Wherefore plaintiff prays judgment as in his complaint demanded.

GATES & EMERY,

Plaintiff's Attorney,

422 Central Building, Seattle, Wash.

State of Washington,

County of King,—ss.

Charles J. Schleif, being first duly sworn, says, that he is the plaintiff in the above-entitled action; that he knows the contents of the foregoing reply and believes the same to be true.

[Seal]

CHARLES J. SCHLEIF.

Subscribed and sworn to before me this 11th day of July, A. D. 1913.

GEO. D. EMERY,

Notary Public for Washington, Residing at Seattle.

14 *Puget Sound Traction etc. Company*

Due and timely service of within this 14th day of July, 1913, and receipt of a copy thereof, admitted.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Defendant.

[Indorsed]: Reply. Filed in the U. S. District Court, Western Dist. of Washington. July 14, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [12]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and assess his damages at the sum of \$1,470.00, Fourteen Hundred and Seventy Dollars.

K. K. PARKER,

Foreman.

[Indorsed]: Verdict. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 9, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [13]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Judgment.

The above-entitled action having come on for trial on the 8th day of January, A. D. 1914, before the Honorable Jeremiah Neterer, Judge of said court and a jury duly empaneled and sworn therein; the plaintiff appearing in person and by Geo. D. Emery, his attorney, the defendant appearing by A. J. Falknor, its attorney, and both parties having offered evidence in the cause and the Court having duly charged the jury, the jury having retired on further consideration did on the 9th day of January, A. D. 1914, return into court their verdict, which was duly entered and filed in said court and in said action, in favor of the plaintiff and against the defendant in the sum of One Thousand Four Hundred Seventy Dollars (\$1,470.00);

Now, therefore, upon motion of Geo. D. Emery, Esq., attorney for plaintiff, and pursuant to said verdict, it is by the Court considered and adjudged that the plaintiff above named do have and recover from

and of said defendant the sum of one thousand four hundred seventy dollars (\$1,470.00) as damages, together with his costs and disbursements herein to be taxed and inserted by the Clerk.

Dated this 13th day of January, A. D. 1914.

By the Court:

JEREMIAH NETERER,

Judge. [14]

Due and timely service of within Judgment this 10th day of January, 1914, and receipt of a copy thereof, admitted.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Defendant.

[Indorsed]: Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 13, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [15]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2508.

CHARLES J. SCHLIEF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Petition for New Trial.

Comes now the defendant, the Puget Sound Traction, Light & Power Company, and petitions this Honorable Court that a new trial of this action may be granted for the following causes materially affecting the substantial rights of the parties:

I.

Insufficiency of the evidence to justify the verdict of the jury in the following particulars, to wit:

(a) The defendant claims that the evidence given upon the trial of this action was insufficient to establish any negligent act or omission on the part of the defendant or any agent, servant or employee or vice-principal of the defendant, causing, or tending to cause the accident and injury complained of by the plaintiff in his complaint herein, or which was the direct or proximate cause of such accident or injury. Defendant claims that the evidence given at this trial established that the plaintiff was engaged at work at a place where the car of defendant could, and would have safely passed him without occasioning any injury, and that when said car was within a very few feet, and at a time when it was [16] not possible to stop the same, even though it had been going at a rate of twelve miles an hour or less, the plaintiff, either accidentally or carelessly, jumped upon the track and collided with the car.

(b) The defendant claims that the evidence given at the trial of this action showed that the plaintiff's injuries were caused by his own careless acts and negligence. Defendant claims that the evidence es-

tablished in this case that the plaintiff so carelessly or negligently stepped upon short planks, the ends of which were unsupported, and was thereby caused to step or jump on the track over which the street-car was operated, immediately in front of an approaching car and at a time when it was not possible to stop the same and avoid a collision with the plaintiff.

(c) The defendant claims that the evidence given at the trial of this action established that the plaintiff was engaged in that extra-hazardous employment covered by the Workmen's Compensation Act, and that any injuries that he received were received at the plant of his employer and that he was required to look to the State of Washington for any compensation for the injuries received.

II.

Error in law occurring at the trial. The particular errors occurring at the trial relied upon by the defendant in support of this petition are as follows:

(a) The Court erred in denying defendant's motion that the Court instruct the jury to return a verdict for the defendant, for the reason that it appeared from all the evidence in the case that the defendant was not guilty of any negligent act which was the direct or proximate cause of such accident or injury, and for the reason that the evidence showed [17] that said accident and injury were caused by plaintiff's own careless acts and negligence and for the reason that the evidence showed that any claim for compensation that the plaintiff might have was against the State of Washington.

(b) The Court erred in submitting the said action to the jury.

(c) The Court erred in refusing to instruct the jury as follows:

“You are instructed that the motorman of the car in question had a right to presume that its preference and superior right in the use of its track would be respected by the plaintiff, and the motorman in charge of the car had a right to presume that as the car approached the place where the plaintiff was that the plaintiff would not get upon the track in front of his car, or that if he was on the track or so near that he was in danger of being struck, that he would remove himself off the track and out of the way of danger, and I further charge you that the motorman relying upon such presumption was not required to stop his car or even slacken the speed of his car until the danger of a collision between his car and the plaintiff became imminent.”

The defendant requested the above instruction, and duly excepted to the refusal of the Court to give the same, which exception was allowed.

The above instruction was particularly applicable to the facts for the reason that the motorman had the right to assume that the car's preference right to the track would be respected by the plaintiff who was working at a safe distance from the track, and as the motorman approached the place where the plaintiff worked, the plaintiff being at a safe distance from the track, the motorman had a right to assume that the plaintiff would not get on the track in front of

his car and he had a right to rely upon such presumption and was not required to stop his car, or even slacken the speed of the same until the danger of a collision became imminent, and it appearing that the motorman after the [18] danger of a collision became imminent, did all that he could to avoid hitting the plaintiff, but owing to the nearness of the plaintiff to the car at the time he got in front of it, it was impossible to stop the car and avoid the collision.

(d) The Court erred in refusing to instruct the jury as follows:

“You are further instructed that it was the duty of the plaintiff to use his senses, his eyes and his ears, especially when working in or about a place where a collision with a car was likely to occur, in order to discover the proximity of a passing car of the defendant, and his failure so to do would constitute contributory negligence and prevent any recovery on his part. The law requires one working in or about a street-car track to be on the lookout and to listen for approaching cars, and if you find in this case that the plaintiff failed to look and listen and that had he looked and listened he would have discovered the car, then his failure so to do would constitute contributory negligence and he cannot recover, and your verdict should be for the defendant.”

The defendant requested the above instruction, and duly excepted to the refusal of the Court to give the same, which exception was allowed.

The evidence in this case of the plaintiff himself was to the effect that had he looked he could have seen the approaching car for some 900 feet, that he did not look for the approaching car and that he was engrossed with his work and gave no heed or thought to cars. The evidence shows that he was entirely oblivious to his surroundings and that he was guilty of such contributory negligence as to preclude him from recovering herein.

(e) The Court erred in refusing to instruct the jury as follows:

“I charge you if you find in this case that the plaintiff was standing to the north of the man-hole helping a fellow laborer in said manhole, and when said car was in close proximity to him either through the teetering effect of a board, or otherwise, stepped upon the track in front of said car at a time when it [19] was not possible to stop the car and avoid injury, then I charge you that he cannot recover even though the gong on said car had not been previously sounded and even though the speed of said car was excessive, for under such circumstances plaintiff's own conduct contributed to his injury and your verdict should be for the defendant.”

The defendant requested the above instruction, and duly excepted to the refusal of the Court to give the same, which exception was allowed.

The above requested instruction was particularly applicable to the facts herein and as neither the speed of the car nor the sounding of the gong under the evidence either was a proximate cause or contributed

to a proximate cause or *contributed to a proximate cause* of the accident, and as the plaintiff stepped upon the track in front of the car at a time when it was not possible to stop the car, therefore the above instruction should have been given and it was error not to do so.

(f) The Court erred in refusing to instruct the jury as follows:

“I charge you that in this case that the plaintiff was in the employ of a contractor in the performance of work covered and included under the law of the State of Washington relating to compensation for injured workmen, and that he was engaged at such work at the plant of his employer and that under such law relating to compensation of injured workmen plaintiff is required to look to the State of Washington for compensation for injuries received herein.”

The defendant requested the above instruction, and duly excepted to the refusal of the Court to give the same, which exception was allowed.

The evidence in this case established that the plaintiff was engaged in the performance of work covered and included in the law of the State of Washington relating to compensation for injured workmen, and was engaged at such work at the plant of his employer, and under such circumstances [20] not being permitted to make an election, and in any event defendant was entitled to have submitted to the jury the question of fact as to whether or not the plaintiff was engaged in such work at the plant of his employer, admittedly he being engaged in work covered

by such act relating to compensation for injured workmen.

(g) The Court erred in refusing to instruct the jury as follows:

“I charge you that the term ‘plant of the employer’ in law means the place where the employer is carrying on his work, and in this case if the plaintiff was injured at the place where his employer was carrying on his work, then I charge you that he was injured at the plant of his employer within the terms of the provision of the law relating to compensation for injured workmen, and being at the time engaged in work covered by the said law of the State of Washington relating to compensation for injured workmen, it is your duty to return a verdict for the defendant.”

The defendant requested the above instruction, and duly excepted to the refusal of the Court to give the same, which exception was allowed.

The plaintiff admittedly being engaged in the performance of work covered by the law relating to compensation for injured workmen and the only question being involved was whether he was employed at the plant of the employer, which in any event was only a question of fact, the foregoing instruction should have been given and the jury should have been permitted to determine the issue as to whether or not the plaintiff was not engaged in said work at the plant of the employer.

(b) The Court erred in instructing the jury as follows:

“You, gentlemen of the jury, fix the standard for reasonable and prudent men under the circumstances in this case as you find them, according to your judgment and experience, or what that class of men would do under the circumstances as detailed by the witnesses and the evidence in this case, taking into consideration [21] all of the circumstances as detailed to you upon the witness-stand and all of the facts and circumstances as disclosed upon the trial, and try it by that standard.”

The defendant objects to this instruction particularly for the reason that it allows the jury independent of the rules established by law and decisions to fix the standard for reasonable and prudent men. They must determine under the instructions of the Court defining what constitutes reasonable and prudent care whether or not the plaintiff in this case was exercising such care but it was not competent for the Court to allow the jury to fix their own standard of what constitutes reasonable and prudent care.

(i) The Court erred in instructing the jury as follows:

“The defendant company cannot, however, recklessly run its cars at a speed irrespective of the presence of the plaintiff’s employments near its track.”

The defendant objects to this particular instruction for the reason that there was no evidence to justify the instruction and for the further reason that no reckless running of the car was proximate or contributed to a proximate cause of the accident, and

therefore was immaterial, and the giving of such instruction tended to confuse and was improper, and that said instruction in effect submitted to the jury the issue of wilful and wanton negligence which was neither raised by the pleadings or evidence.

(j) The Court erred in instructing the jury as follows:

“You are instructed that the plaintiff, in his employment, upon the street at the point of accident, if you find one did take place, had the right to rely upon the fact that the defendant company would not run its car faster than the limit of speed required by the ordinance, and the motorman operating the car would give the usual warning by ringing a bell or sounding a gong to advise plaintiff of the approach of the car.” [22]

The defendant objects to this particularly for the reason that the plaintiff was outside, or beyond the zone of danger and where if he had remained at his usual place of work he would not have been hit by the car, and therefore he had no right to rely upon or expect the ringing of the bell, or that the car would be operated at any particular speed. The defendant company would not be under any obligation of ringing a bell or sounding a gong to advise anyone who was not within the zone of danger or at a place where he would be hit by the passing car. The said instruction is objectionable also for the reason that there was insufficient evidence to raise an issue of fact as to failure of the motorman to sound the gong.

(k) The Court erred in instructing the jury as follows:

“You are instructed that one of the defenses in this case is that the plaintiff was employed in extra-hazardous work, an employment which comes within the scope of the State Industrial Insurance Act, and that because of the provisions of that Act, he cannot recover in this case. I instruct you that under the evidence as it is presented before you in this case, that the Act does not apply to the issue before you for consideration and that you will entirely disregard such defense on the part of the defendant and determine this case entirely upon the evidence which has been admitted as to the negligence on the part of the defendant, or contributory negligence on the part of the plaintiff, as outlined and defined in these instructions.”

The defendant objects to this instruction for the reason that under the evidence in this case, the plaintiff being employed in extra-hazardous work, which comes within the scope of the State Industrial Insurance Commission, being Chapter 74 of the Laws of 1911 of the State of Washington, relating to compensation for injured workmen, and which did apply, and in any event the only question was whether or not he was engaged in such work at the plant of his employer, [23] and in any event this defendant was entitled to have that issue submitted to the jury. Defendant, however, contends that the evidence showed that he was at work at the plant, but if there were any doubt on that issue, the defendant

was entitled to have that issue determined as any other question of fact by the jury.

(1) The Court erred in instructing the jury as follows:

“You are instructed, however, that if by a fair preponderance of the evidence, you believe that the car was running more than twelve miles an hour at the place of the accident, the burden of proof would, by such act be shifted to the defendant to show by a fair preponderance of the evidence that the injury if one was sustained, was the result of contributory negligence on the part of the plaintiff and that such negligence was the proximate cause of the injury and without which it would not have happened.”

The defendant complains of this instruction because it assumes that the speed of the car was the proximate cause of the accident and shifts the burden upon the defendant to show merely from the fact that the car was operated at an excessive speed that the injury resulted from contributory negligence, the law being that the plaintiff must not only establish that the car exceeded the limit fixed by the ordinance, but he must go further and establish that such negligent act was the proximate cause of the accident. The mere establishing of such fact would not be sufficient to establish a *prima facie* case of negligence and shift the burden upon the defendant to establish contributory negligence.

This application and petition for a new trial will be made upon the pleadings in the action and all papers on file, and upon the minutes of the Court

including not only the Clerk's minutes and any notes or memoranda which may have been kept by the Judge, but also the reporter's transcript of his shorthand [24] notes and all exhibits.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Defendant.

Copy of within Petition for New Trial received and service acknowledged this 29th day of Jany., 1914.

G. D. EMERY,

Atty. for Pltf.

[Endorsed]: Petition for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 29, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [25]

[Order Denying Motion for New Trial.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY,

Defendant.

MOTION FOR NEW TRIAL DENIED.

Filed March 18, 1914.

GEORGE D. EMERY, for Plaintiff.

JAS. B. HOWE, A. J. FALKNOR, for Defendant.

NETERER, District Judge.

I have carefully considered the briefs that have been filed in this case on the motion for a new trial, and am satisfied with the record of the case as made and find no reason that would justify me in granting the motion for a new trial. The motion for a new trial is therefore denied. Exceptions noted.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed in the U. S. District Court, Western District of Washington, Northern Division. Mar. 18, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [26]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2508.

CHARLES J. SCHLIEF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Stipulation [Extending Time to File Bill of Exceptions].

It is hereby stipulated by and between the plaintiff and the defendant that the defendant shall have thirty (30) days from and after the 9th day of January, 1914, within which to prepare, serve and file a Bill of Exceptions herein, and that the Court may enter an order to that effect.

GEO. D. EMERY,
Attorney for Plaintiff.

JAMES B. HOWE,
A. J. FALKNOR,

Attorneys for Defendant. [27]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2508.

CHARLES J. SCHLIEF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Order [Extending Time to File Bill of Exceptions].

The stipulation of the parties for an order extending the time in which the defendant may prepare, serve and file a Bill of Exceptions in the above action, having come on regularly to be heard, and it having been made to appear to the satisfaction of the Court that ten days have not elapsed since the return of the verdict in said action, and that no extension

of time has been previously given or obtained, and the Court having been fully advised in the premises, it is now upon motion of the attorneys for the defendant, and in accordance with the stipulation of the parties, ordered and adjudged that the defendant's time within which to prepare, serve and file a Bill of Exceptions in the above action, be, and the same is hereby extended, and the defendant is allowed thirty (30) days from the 9th day of January, 1914, within which to prepare, serve and file a Bill of Exceptions in the above action.

JEREMIAH NETERER,

Judge.

O. K.—G. D. EMERY,

Attorney for Plaintiff.

[Endorsed]: Stipulation and Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 12, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [28]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

Number —

CHARLES J. SCHLIEF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Defendant's Proposed Bill of Exceptions.

[29]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. —

CHARLES J. SCHLIEF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Defendant's Proposed Bill of Exceptions.

FIRST EXCEPTION.

Be it remembered that in the trial of this cause on the 8th day of January, 1914, before the Honorable Jeremiah Neterer, both parties appearing by counsel, the jury was duly impaneled and sworn and at the close of all the evidence the defendant challenged the sufficiency of the evidence to sustain a verdict for the plaintiff, for the reason that the evidence showed that there was no negligence of the defendant that contributed to or was the proximate cause of the injury, and for the reason that the evidence showed that the injuries which the plaintiff received, if any, were caused by his own careless acts and negligence, and for the reason that the evidence showed that the plaintiff must look to the Workmen's Compensation Act of the State of Washington for any relief; and asked the Court to instruct the jury to return a verdict for the defendant.

Such request and motion of the defendant was denied by the Court and to the denial thereof the defendant duly excepted and its exception was allowed. [30*—1†]

The defendant submits the following stenographic report of the trial herein, consisting of pages 1c to 180 inclusive, which is all of the evidence given and received upon the trial of the action, together with all exhibits, being Plaintiff's Exhibits "A" to "H," inclusive, and Defendant's Exhibits 1 to 12, inclusive, referred to and received in evidence as a Bill of Exceptions in support of said first exception. [31—[1a]

INDEX.

PLAINTIFF'S WITNESSES.	Dir.	Crs.	Redr.	Recr.	R-Rdr.
	Exam.	Exam.	Exam.	Exam.	Exam.
Hanson, Mike	114	116			
Horsfall, Dr. Frank L.	62	69	72		
Jones, Dr. Everett O.	82	87			
Krogh, ———	118				
Kroon, John.	90	96			
Kumpf, ———	100	108	111		
McKinney, Dr. M. W.	2	8	19		
Schlieff, Charles J.	22	41	55	58	61
Schlieff, Charles J. (Rec.)	124				
Snively, Dr. J. H.	73	75	80	81	
DEFENDANT'S WITNESSES.					
Davidson, O.	173	175	176		
Elmore, Dr. Bruce	147	150	152		
Elmore, Dr. Bruce (Rec.)		157	157		

*Page-number appearing at foot of page of original certified Record.
†Original page-number appearing at foot of page of Bill of Exceptions
as same appears in Certified Transcript of Record.

34 *Puget Sound Traction etc. Company*

DEFENDANT'S WITNESSES.	Dir. Exam.	Crs. Exam.	Redr. Exam.	Recr. Exam.	R-Rdr. Exam.
Higley, R. R.	169				
Nelson, R. B.	159	160			
Thompson, Dr. H. B.	129	139	146		
Thompson, Dr. H. B. (Rec.)	155				
Ward, R. E.	164	165			

PLAINTIFF'S REBUTTAL WITNESSES.

Schlieff, Charles J. (Rec.)	178
-----------------------------	-----

PLAINTIFF'S EXHIBITS.

Exhibit A.	57
------------	----

" B.	57
------	----

" C.	24
------	----

" D.	40 - 57
------	---------

" E.	57
------	----

" F.	57
------	----

" G.	59
------	----

" H.	66
------	----

DEFENDANT'S EXHIBITS.

Exhibit 1.	19
------------	----

" 2.	19
------	----

" 3.	19
------	----

" 4.	50
------	----

" 5.	56
------	----

" 6.	59
------	----

" 7.	71-134
------	--------

" 8.	131-134
------	---------

" 9.	134
------	-----

" 10.	134
-------	-----

" 11.	137
-------	-----

" 12.	137
-------	-----

2 P. M. Session, Jan. 8.	39
--------------------------	----

10 A. M. Session, Jan. 9.	127
---------------------------	-----

2 P. M. Session, Jan. 9.	180
--------------------------	-----

Plaintiff Rests.	125
------------------	-----

Defendant Rests.	177
------------------	-----

Court's Instructions.	181.
-----------------------	------

Defendant's Exceptions.	196. [32-1b]
-------------------------	--------------

*In the United States District Court, for the Western
District of Washington.*

No. —.

CHARLES J. SCHLIEF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY,

Defendant.

Defendant's Proposed Statement of Facts.

APPEARANCES:

For the Plaintiff, Messrs. GATES & EMERY.

For the Defendant, JAMES B. HOWE, Esq., and
A. J. FALKNOR, Esq.

BE IT REMEMBERED that the foregoing numbered and entitled cause came on regularly to be heard on the 8th day of January, 1914, before the Honorable Jeremiah Neterer, Judge of the above-entitled court, plaintiff appearing in person and being represented by his counsel, Messrs. Gates & Emery; the defendant appearing by its counsel, A. J. Falknor, Esq.; a jury having been duly impaneled and sworn to try said cause, all parties announcing themselves ready for trial, the following proceedings were had and testimony given, to wit: [33—1c]

(Opening statement by counsel for plaintiff.)

[Testimony of Dr. M. W. McKinney, for Plaintiff.]

Doctor M. W. McKINNEY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

(Testimony of Dr. M. W. McKinney.)

Direct Examination.

(By Mr. EMERY.)

Q. Doctor McKinney, where do you reside?

A. 5502 14th Avenue Northeast.

Q. In this city? A. Yes, sir.

Q. You are a physician and surgeon?

A. Yes, sir.

Mr. FALKNOR.—I will admit his qualifications.

Q. Did you attend Mr. Charles Schlieff, the plaintiff here for an injury that occurred about a year ago? A. I did.

Q. That was very shortly after the injury; within a few minutes? A. Yes, sir.

Q. The injury occurred almost in front of your office? A. Yes, sir.

Q. What was Mr. Schlieff's condition; describe what you found upon examination at that time?

A. I found an injury—a fracture of two ribs; a fracture [34—2] of the tibia and fibula—I believe it was the right foot—no, the left foot. He was in an unconscious condition. He remained in this unconscious state for several days, before his mind became clear; rather semi-unconscious.

Q. You say two ribs were broken? A. Yes, sir.

Q. What were they?

A. I don't know as I can tell you exactly. I did not look it up before I came down. The records will show it.

Q. Was he taken to a hospital? A. Yes, sir.

Q. What hospital? A. The Seattle General.

Q. And you treated him there? A. Yes, sir.

(Testimony of Dr. M. W. McKinney.)

Q. How long?

A. He was there, I think about ten days.

Q. Both bones of the left leg were broken?

A. Yes, sir.

Q. Just above the ankle? A. Yes, sir.

Q. Was the ankle bone also broken?

A. I think not. The X-ray plate did not show it.

Q. Was there any dislocation or injury to the foot?

A. The bones were dislocated, yes.

Q. Were any of them worse than dislocated; was there any injury to the tendons of the foot?

A. The tendons were—yes. They necessarily had to be torn in order to let the foot be dislocated.

[35—3]

Q. Can you state what bones of the foot were displaced?

A. They were all pretty much displaced, that is on the ankle, the astragalus.

Q. That is the large bone immediately under—

A. No, the os calcis.

Q. The os calcis is the heel bone?

A. Yes, sir, and the cuneiform bones—

Q. For the purpose of making it plain to the jury, I will just identify by description, the bones of this foot in the picture. What bone is this to which I point? (Indicating.)

A. That is the cuboid.

Q. I will mark that A?

A. Yes, sir. These are the cuneiform bones; the cuboid and the astragalus and the os calcis.

Q. I will mark them 1, 2 and 3, the cuneiform

(Testimony of Dr. M. W. McKinney.)

bones? A. Yes.

Q. And the astragalus I will mark B?

A. Yes, sir.

Q. And the os calcis C? A. Yes.

Q. Articulating or connecting with these three cuneiform bones are the metatarsal bones forming part of the toes? A. Yes, sir.

Q. The inner part of the toes; these are what you call the phalanges? A. Yes, sir.

Q. Were these metatarsal bones displaced; the four or five bones there? A. No. [36—4]

Q. Only in their connection with the cuneiform?

A. Apparently not displaced at all as far as I could tell.

Q. These bones are all connected by ligaments and cartilages? A. Yes, sir.

Q. And interlaced very intrically across them?

A. Yes, sir.

Q. Holding the foot in place? A. Yes, sir.

Q. To what extent were these cartilages torn from the bone? A. Nobody could tell.

Mr. EMERY.—Mark this Plaintiff's Exhibit "A."

Q. Did you have an X-ray picture taken at that time, of the foot? A. Yes, sir.

Q. Have you got the picture, the plate?

A. No, I have not.

Q. Where is the plate?

A. Doctor Thompson of the Seattle General Hospital—

Q. Did he act in behalf of Mr. Schlieff, or was he acting for the Street Railway Company?

(Testimony of Dr. M. W. McKinney.)

A. Well, for the Street Railway.

Mr. EMERY.—Well, I think you had better produce that. Have you that plate?

Mr. FALKNOR.—Well I don't know. Here is one.

Q. I will show you a plate which I will ask the clerk to mark Plaintiff's Exhibit "B." I will show you now this X-ray plate which will be established later was taken day before yesterday by Doctor Snively, of the left foot of Mr. Schlieff. Do you recognize any dislocation or displacement of the bones of that foot? [37—5]

A. Well, the arch is down.

Q. Then that results in what you call in Medical Parlance a flat foot? A. Yes, sir.

Q. Will that condition remain and be permanent through life? A. It surely will.

Q. That results from displacement and laceration of those tendons and ligaments? A. Yes, sir.

Q. That result might follow from the condition you found the foot in at the time you examined it?

A. Yes, sir.

Q. How often did you attend the plaintiff there?

A. I saw him twice a day I think the first two weeks and then every day afterwards that he was in the hospital. I do not remember every time I saw him. I saw him several times after he went home.

Q. What was the result of his injury; did the fracture heal? A. Yes, sir.

Q. Made as good a recovery as you could expect?

A. Yes, sir.

(Testimony of Dr. M. W. McKinney.)

Q. The ribs knitted and healed as well as you could expect naturally?

A. Yes, sir. There is a knot or lump on the ribs.

Q. There is a knot or lump on the ribs?

A. Yes, sir.

Q. That was not there before? A. Yes, sir.

Q. That is a result of the injury?

A. Yes, sir. [38—6]

Q. Does that affect his power or working ability or comfort?

A. I haven't heard him say anything about it recently.

Q. As far as you know, would it or would it not?

A. Well, I think not, at present.

Q. The legs—the bones of the legs healed well, did they, the tibia and the fibula? A. Yes, sir.

Q. And the joint at the ankle was all right?

A. Except as to the tendons.

Q. Were the tendons of the joint injured as well as the tendons of the foot; the tendons of the ankle joint injured?

A. The tendons that held the bone, yes; resulting in the flat foot.

Q. You say that in your judgment that injury is a permanent one? A. Yes, sir.

Q. And will remain through life? A. Yes, sir.

Q. Now what is he obliged to do in order to counteract the breaking down of the bones?

A. In my judgment all that can be done is to wear a support both to hold the arch up and a support around the ankle to keep it from spreading.

(Testimony of Dr. M. W. McKinney.)

Q. To hold the arch in place you put a support under it?

A. Put a support under it and then around it to keep it from spreading.

Q. It is necessary for him to wear that always, is it? A. Yes, sir. [39—7]

Q. Even then will it make as strong and perfect a foot as if he had not been injured? A. No, sir.

Q. What is the fact in regard to his liability to suffer pain from that all his life?

A. All figures vary, but he is liable—

Q. What is the effect of that injury as age increases, of becoming more severe; will it or will it not?

A. Well, it will probably become more so, yes.

Q. Who paid you for your services?

A. Mr. Schlieff.

Q. Can you state the amount he paid you?

A. He paid me fifty dollars.

Q. Do you know whether he paid the hospital or not. That is not within your knowledge?

A. I don't know.

Mr. EMERY.—That is all.

Cross-examination.

(By Mr. FALK'NOR.)

Q. Now, Doctor, on the day of the accident, yourself and Doctor Thompson examined him together?

A. Yes. [40—8]

Q. You made an examination at the hospital?

A. Well, we made one there and I made one at

(Testimony of Dr. M. W. McKinney.)

home before we went to the hospital; where he was injured.

Q. Wasn't the result of your examination about like this; a thorough examination was made when in the hospital, and this showed a little bump on the left side of the forehead with a slight cut of the skin; you found a little bump on the left side of the forehead with a slight cut of the skin; isn't that correct, or do you remember?

A. Well, there was something about that, yes.

Q. He complained of some tenderness on the right side of the chest but neither Doctor McKinney nor I—nor myself could make out any evidence of fracture of the ribs.

Mr. EMERY.—You are not reading Doctor McKinney's testimony?

Mr. FALKNOR.—I am asking him if this was not the result of that examination.

A. Well, the first examination, that is true, but I attended the case afterwards and I found there was a fracture and I strapped it.

Q. Did you take an X-ray? A. Of the ribs?

Q. Yes. A. No, it wasn't necessary.

Q. Well, that would have demonstrated ordinarily whether there was a fracture, would it not?

A. Yes.

Q. But you did not take an X-ray?

A. No. [41—9]

Q. But now you made an examination with Doctor Thompson in the hospital, and neither of you discovered at that time a fractured rib?

(Testimony of Dr. M. W. McKinney.)

A. Well, the man was so near unconscious—

Q. I am asking you, at that time, neither of you could determine that there was a fractured rib, could you?

A. Well, we did not make sufficient examination to swear that there was not.

Q. You took an X-ray of course immediately; either you or Doctor Thompson took an X-ray?

A. Yes, sir.

Q. At the hospital at that time? A. Yes, sir.

Q. In the leg there are two bones below the knee?

A. Yes, sir.

Q. One is called the fibula and the other the tibia? A. Yes, sir.

Q. Which is the larger? A. The tibia.

Q. The tibia is the larger of the two?

A. Yes, sir.

Q. The tibia is—we speak of it as the big bone?

A. Yes.

Q. Between the knee and the ankle?

A. Yes, sir.

Q. And the fibula is the small bone?

A. Yes, sir.

Q. Now about where was the fracture?

A. You have your X-ray plate; let me look at it.

Q. I know, but I am asking you— [42—10]

A. Well, it is hard for one's memory to say just positively about that.

Q. Now, didn't the X-ray show that only the small bone of the leg was fractured?

A. Let me see it and I will tell you.

(Testimony of Dr. M. W. McKinney.)

Q. Well, I have asked for it. There is a fracture in this report of the lower end of the left fibula?

A. How is that?

Q. This report indicates to me as follows: There is a fracture of the lower end of the left fibula. That would be at the smallest part of the small bone, wouldn't it?

Mr. EMERY.—You are reading not from Doctor McKinney's statement—

Mr. FALKNOR.—That is all right. I am asking the Doctor if this is the report made on that day and if it did not indicate after the X-rays were taken that only the small bone of the leg between the knee and the ankle had been fractured.

Q. Now, isn't that true, that only the small bone between the ankle and the knee had been fractured?

A. Show me the X-ray plate.

Q. Then you did not mean to tell the jury that both bones of the leg between the knee and the ankle were fractured?

A. The X-ray plate will tell the truth about that.

Q. But if the X-ray plate shows but that one were fractured then you are willing to accept the X-ray?

A. Yes, sir.

Q. And do you not remember also that the X-ray showed that the bone that was broken was in good position? A. No, sir. [43—11]

Q. Didn't you, when you reduced it, at least put it in good position? A. Yes, sir.

Q. Now you say there were how many ribs broken?

A. Two.

(Testimony of Dr. M. W. McKinney.)

Q. You made a report did you not, Doctor, to the Industrial Commission bearing upon the injuries of the plaintiff? A. Yes, sir.

Q. Did you not, Doctor McKinney, on February 23d, 1913, one month after the accident, make a report to the Industrial Commission bearing upon the nature and extent of this man's injuries?

A. I don't know what the date was.

Q. Well, you saw him regularly from the day of the injury and you treated him as a physician?

A. Yes, sir.

Q. Up until he was discharged, you were his attending physician? A. Yes, sir.

Q. You would have seen him about every day following the injury, would you not, Doctor?

A. Well, about so, yes, I saw him.

Q. A month following the injury you ought to have had a pretty good idea of the nature and extent and duration of his injuries, don't you think?

A. Yes, sir.

Q. Is that your signature (handing witness paper)? A. I guess it is.

Q. Well, it is, isn't it? A. Yes, sir. [44—12]

Q. You made that report to the commission?

A. I suppose I did.

Q. On February 23d, 1913, that is the date of it, isn't it? A. How is that?

Q. On February 23d, 1913.

A. 19—yes, that is what the date says.

Q. If the accident occurred on January 23d, this report was made one month after the injuries?

(Testimony of Dr. M. W. McKinney.)

A. Yes, sir.

Q. One month after you had been treating him?

A. Yes, sir.

Q. Did you not in this report say, "One rib broken"? A. Probably I did; I don't know.

Q. You would have known a month afterwards whether there was one rib broken or two ribs broken, would you not? A. No, I might not.

Q. When did you discover that there were two ribs broken? A. I can't tell you now.

Q. Anyway in this report you stated that one month after the accident that there was but one rib broken? A. I see it there, yes, sir.

Q. Now one month after the accident what did you think was the possibility of any permanent injury. Did you have at that time any idea whether there would be any permanent injury or not?

A. Where?

Q. On the man anywhere. One month afterwards, you should have been able to make up your mind pretty definitely whether there were any permanent injuries or not.

A. Well, it is a little hard to tell in these cases. Sometimes [45—13] you can tell and sometimes you can't. My opinion in this man's case was that there would be, and that is my opinion now.

Q. Now, one month after the accident what did you state to the Industrial Commission about what there would be as to a permanent injury?

Mr. EMERY.—I object to that. The report is the best evidence.

(Testimony of Dr. M. W. McKinney.)

The COURT.—Let him answer.

Q. What did you say as to there being a permanent injury one month after he was injured? You find the question answered there, do you not?

A. I stated here, after three or four months. This question is what you are getting after “In your opinion will any permanent disability follow,” and I have answered “I think not.” Now, I want to say right here—

Q. That is you did answer—

A. (Interrupting.) Just a minute.

Q. Then you did answer in answer to the question from the Industrial Commission one month after you had been treating the man that you did not think there would be any permanent disability?

A. I said “I think not” but I want to explain that this way. No man can tell that, because no man can tell about these ligaments until the man begins to use them. He had not begun to use them nor did not probably for a couple of months after that.

Q. (By Mr. EMERY.) After this report was made? A. Yes.

Q. (By Mr. FALKNOR.) Did you say anything in any report to [46—14] the commission that the man would have a flat foot?

A. I don’t remember whether I did or not.

Q. Well, don’t you know that you did not, Doctor?

A. No, sir, I don’t know that I did not.

Q. You thought at this time that he would have a disability of three or four months but at that time you did not think he would have any permanent dis-

(Testimony of Dr. M. W. McKinney.)

ability; that was your opinion?

A. That was my impression.

Q. You made subsequent reports to the commission, did you not, Doctor; on March 19th did you send that to the Industrial Commission (handing witness card), that report? A. Yes, sir.

Q. In that report you stated, did you not, that his progress towards recovery was good? A. Yes.

Q. You thought so at that time?

A. Yes, sir, but I want you to remember—

Q. Just a minute now. In this second report you did not modify your report to the commission that you did not think there would be any permanent disability.

Mr. EMERY.—I object to that; he was not asked about any permanent disability. There is nothing on the card indicating any request of that kind.

The COURT.—Answer the question.

Q. In your second report, you did not in any wise modify or qualify your statement that you did not think there would be any permanent disability, did you?

Mr. EMERY.—I object to that, your Honor; there is nothing showing it. It is improper and immaterial. [47—15]

Mr. FALKNOR.—I want to be fair with the Doctor.

The COURT.—Let him answer.

A. I am willing to answer it if you will just let me explain my answer.

Q. Well, you did not, in your report—

(Testimony of Dr. M. W. McKinney.)

A. No, I did not.

The COURT.—Now, you can explain any answer that you desire to make.

A. The point is this: The ligaments are torn; the patient had not begun using his foot and you cannot tell whether the ligaments were torn. That is, as to whether it was going to be a permanent disability until he begun to use them to see how much repair had taken place in the ligaments, and at this time he had not used his foot sufficiently for anyone to tell how much or positively whether those ligaments were going to regain—be repaired sufficiently to hold the arch in place. It was my judgment that they would be and I answered accordingly, but that is not proof that they would.

The COURT.—Let me suggest that that exhibit be identified, and marked.

Mr. FALKNOR.—I haven't yet offered them.

The COURT.—Well, let us keep track of them. They have not been identified.

Q. Now, you did make a report to the commission, did you not after you had discharged him; did you not? A. I don't know whether I did or not.

Q. Look at that.

The COURT.—Let this be marked and let the others be marked.

Q. This one, number one and the next one number two, and then [48—16] this one will be number three. Just look at that and see if that is not a report that you made to the commission a month after you discharged him?

(Testimony of Dr. M. W. McKinney.)

A JUROR.—Pardon me. Ought we not to have the profile of the right foot also to compare the two?

Mr. EMERY.—We will have that profile and pictures and everything else before we get through.

The WITNESS.—You are asking me a question. Mr. Thompson and I put up the foot together. He is your doctor. In fact he did as much of the work as I did in setting it and we advised on the case together in treating it. While it was my case, yet he did not see him after that, but we talked about it, I do not remember how many times, but I reported to him.

Q. I am not asking you about that.

A. In regard to the permanent disability, we could not tell at that time but I simply gave my opinion as I give it to you.

Q. That is on the first exhibit?

A. Well, after the time—now the man's condition now and what has intervened does not have anything to do with it. It is just a waste of time in getting it.

Q. Now, did you not report to the Industrial Commission on or about April 17th, 1913, about four months after the injury; isn't this exhibit identification number three your report?

Mr. EMERY.—I object to that as immaterial.

The COURT.—Let him answer.

Mr. EMERY.—May it be understood that an exception is noted each time an objection is overruled?
[49—17]

The COURT.—Yes, sir.

(Testimony of Dr. M. W. McKinney.)

Q. Isn't that the report? A. Yes, sir.

Q. Now, did you not, in this report in answer to a question, answer as follows: "Is patient's progress toward recovery"—still four months afterwards—

"A. Yes." A. Yes.

Q. Did you not, in answer to a question "If anything has developed to retard recovery, specify what." "A. No." A. Yes.

Q. Nothing in those four months had developed to retard his recovery?

A. He had not been using it at all.

Q. Have you been treating him since?

A. Not anything only advising him to wear these braces.

Q. You never have given him any treatment since you made this last report to the State?

A. Yes, I have just simply advised him about these braces; that is all that could be done.

Q. But at the end of four months following the injury, you advised the Industrial Commission that nothing had developed to retard his recovery, didn't you?

A. Yes, sir, and as far as I knew there had not.

Q. At that time you had discharged him, or a month previous to this report; he had been discharged about a month? A. Yes, sir.

Mr. EMERY.—Are these offered in evidence?

Mr. FALKNOR.—Yes, we will offer these three exhibits in evidence and ask that they be marked respectively, Defendant's Exhibits 1, 2 and 3. [50—18]

(Testimony of Dr. M. W. McKinney.)

Mr. EMERY.—I have no objection. Put them in.

The COURT.—Admitted.

(Exhibits in question received in evidence and marked Defendant's Exhibits 1, 2 and 3 respectively.)

Q. When did you discover he had two ribs broken?

A. I couldn't tell you.

Q. You never changed your original statement to the State that he had but one rib broken?

A. I could not tell you about that.

Q. In no report that you made to the State did you say anything about a flat foot, did you?

A. No, sir.

Q. And you never treated him for a flat foot once?

A. I have advised him, yes; told him to wear the arch braces.

Redirect Examination.

(By Mr. EMERY.)

Q. You could not tell from the examination of the foot at that time what the extent of the injury would develop [51—19] three or four months afterwards?

A. We could not tell whether it was going to hurt him or not. The mere fact that when he first got up it naturally would be sore; his report to me was that he was getting along very good and we simply sent in the reports that we saw, but as time went along you see what it has come to.

Q. Did you make any other X-ray picture from the one taken at the time Doctor Thompson was there? A. No, sir.

Q. You cannot tell the exact extent of the dislo-

(Testimony of Dr. M. W. McKinney.)

cation of the bones without the X-ray, could you?

A. No, sir.

Mr. FALKNOR.—Don't lead the witness.

Q. This report is in evidence. Just let us read it.

Mr. FALKNOR.—I will state that these are the original files of the Industrial Commission that we have offered; we have certified copies and after the case is over I would like to substitute certified copies so that the originals may be returned.

The COURT.—Certified copies may be substituted.

(Mr. Emery reads exhibits referred to to the jury.)

Q. Did you make a subsequent report that you recall after discovering the extent of the injury as to its permanency?

A. I do not recall anything only those cards.

Q. Were you asked to make any other report or any report later after you discovered the extent of the injury?

A. Well, the Industrial Commission sends slips for reports.

Q. Such as these numbers two and three?

A. Yes, sir, that is all. [52—20]

Q. Did you get any others besides those two?

A. I do not remember if I did.

Q. I notice in Exhibit Two, you state in your opinion, this being dated March 22d,—you state that in your opinion it would be about a month before he could be discharged at that time? A. Yes, sir.

Q. At whose request was the X-ray picture taken?

A. Well, I think I requested it and we both agreed to it.

(Testimony of Dr. M. W. McKinney.)

Q. Who took it? A. Doctor Thompson took it.

Mr. EMERY.—That is all.

Mr. FALKNOR.—That is all.

(Witness excused.) [53—21]

**[Testimony of Charles J. Schlieff, in His Own
Behalf.]**

CHARLES J. SCHLIEFF, the plaintiff, called as
a witness in his own behalf, being first duly sworn,
testified as follows:

Direct Examination.

(By Mr. EMERY.)

Q. Are you the plaintiff in this case?

A. Yes, sir.

Q. State your name. A. Charles J. Schlieff.

Q. How old are you, Mr. Schlieff? A. 43.

Q. This accident happened on January 23d, 1913;
how old were you at that time? A. 42.

Q. Are you married or single? A. Married.

Q. What were you doing on the 23d of January,
1913—how were you employed?

A. I was working for Krog and Jessen.

Q. In what employment; what business?

A. Working on the street; putting in a box—a
catch-basin, chamber.

Q. What was their general business, contracting?
[54—22] A. Contracting; street work.

Q. At that time was there any work being done
on 14th Avenue northeast near 55th Street?

A. Yes, sir.

Q. What work was being done there?

(Testimony of Charles J. Schlieff.)

A. Building a gate-chamber.

Q. That was city work, was it?

A. Why, it was city work; yes, sir.

Q. What contractors were doing the work?

A. Krogh & Jessen.

Q. Were you working for Krogh & Jessen?

A. Yes, sir.

Q. Where were you at work at the time this accident happened?

A. Between 55th Street and 14th Avenue.

Q. On 14th Avenue? A. Yes, sir.

Q. Does this picture—have you looked at this map; does this picture where the round circle is—

A. Yes, sir.

Q. (Continuing.) —indicate where the accident occurred? A. Yes, sir.

Q. Is that the point where the catch-basin was being put in, or what is it? A. A gate-chamber.

Mr. EMERY.—It may be understood that this map which is referred to here may be marked Exhibit "C." We offer it in evidence. I assume it to be correct. Counsel has had it made.

The COURT.—Is there any objection? [55—23]

Mr. FALKNOR.—No objection.

The COURT.—Admitted. That is the plat.

(Plat in question received in evidence and marked Plaintiff's Exhibit "C.")

Q. The point with the center of the circle in the plat is the place where the water-gate was?

A. Yes, sir.

Q. What was the size of the hole dug there to in-

(Testimony of Charles J. Schlieff.)

sert that water-gate?

A. About 6 feet in diameter; 5 or 6 feet deep.

Q. How was the surface of the street on that side; the east side of the street there?

A. Well, it was all tore up.

Q. Was it paved?

A. It was partly paved but right where the hole was it was not.

Q. It was open there where the hole was?

A. Yes, sir.

Q. What was there on the opposite side of the street? A. It was paved.

Q. And what part of the paving had been taken up here along the entire east side of the avenue there; 14th; the top or concrete base?

A. The concrete base.

Q. The concrete base remained there and the top was taken off? A. Yes, sir. [56—24]

Q. Was there a crossing from the east side of the avenue across to the track or how did the passengers or pedestrians come along 55th to get across the track? A. We had some planks laid across there.

Q. Some planks laid across there? A. Yes, sir.

Q. This hole you say was 6 feet wide and 5 feet deep? A. Yes, sir.

Q. How far from the north edge of the hole was the planks?

A. Well, it laid right alongside of the hole.

Q. Between the hole and the crossing planking,—was there any platform or place—receptacle for waiting people up there? A. I don't know.

(Testimony of Charles J. Schlieff.)

Q. How was that space occupied between the planks and the side of the hole; cross-planks; was there any space there at all?

A. No, nothing but planking, but the platform.

Q. What did the ends of those planks rest on?

A. They were laying on the dirt.

Q. On the surface?

A. No, on the dirt; around the hole.

Q. Was there a space underneath the planking down to the concrete, or did they lay flat on the ground?

A. No, they did not lay on the ground at all. They stuck out over the hole.

Q. What was it, the plank or the ends of the ties sticking over the hole?

A. Well, the end of the ties and the planking both.

Q. The ends of the ties from the street railway stuck over [57—25] the hole? A. Yes, sir.

Q. How far was the edge of the hole from the nearest rail—the edge of the water-gate hole from the nearest rail? A. Oh, not very far.

Q. Well, about? A. About two feet.

Q. You think it was about two feet?

A. Yes, sir.

Q. The ends of the ties must have stuck out two feet then if they stuck out over the hole?

A. Yes, sir.

Q. Whatever that was, are you sure that the ties projected over the hole? A. Yes, sir.

Q. What were you engaged in doing?

(Testimony of Charles J. Schlief.)

A. Helping build that gate chamber; I was passing down brick.

Q. You were passing down brick? A. Yes, sir.

Q. Was there a man in the hole building the chamber? A. Yes, sir.

Q. Who was that? A. Mr. Kromm.

Q. You were his helper passing down brick to him? A. Yes, sir.

Q. Where did you go to get the brick?

A. Up on the side street.

Q. Up here (indicating)?

A. Yes, sir. [58—26]

Q. At the point marked A? A. Yes, sir.

Q. Near this corner or back from it?

A. Back from it.

Q. Were the brick piled on the sidewalk or on the street? A. Piled on the parking strip.

Q. Outside of the sidewalk? A. Yes, sir.

Q. Would this point indicate it (indicating)?

A. That is about it.

Q. I will mark it B for brick. I wish you would come down here and show the jury substantially the course you followed when you took your brick from this pile over to the hole; where did you stand?

A. Here (indicating).

Q. Between the hole and the brick?

A. Yes.

Q. At the time you were struck by the car what were you engaged in doing; just that particular time?

A. Well, I must have been passing down brick.

(Testimony of Charles J. Schlieff.)

Q. Was your attention engaged upon that work?

A. It certainly was.

Q. Watching the mason in the hole?

A. Yes, sir.

Q. You had to supply the brick to him just as he needed them? A. Yes, sir.

Q. Now did you hear this car approaching you?

A. No, sir.

Q. Did you hear any bell sounding?

A. No, sir. [59—27]

Q. Or any gong sounding? A. No, sir.

Q. Or any other alarm? A. No, sir.

Q. Between the rails at that point was the street paved? A. Yes, sir.

Q. Level with the top of the rail? A. Yes, sir.

Q. I will ask you what, if anything, there was on the south side of that hole? A. There was dirt.

Q. What dirt was it?

A. The dirt from the hole piled up.

Q. The dirt that came out of the hole was shoveled up on the south side? A. Yes, sir.

Q. Did they use to cover that hole at night when they left it? A. Yes, sir.

Q. What did they cover it with? A. Ties.

Q. What did you do with the ties that day?

A. Piled them up there too.

Q. Piled them up on the dirt? A. Yes, sir.

Q. How far is this track straight in a southerly direction towards town from where you stood?

A. I judge about three blocks.

Q. Could you see all that distance?

(Testimony of Charles J. Schlieff.)

A. Yes, sir. [60—28]

Q. See a car coming? A. Yes, sir.

Q. The man on the car at that distance could see you then could he? A. Yes, sir.

Q. Which direction was the car going that struck you? A. Going north.

Q. That is in this direction (indicating)?

A. Yes, sir.

Q. Which track was it traveling on, when it struck you; on the east or west track?

A. On the east track.

Q. Going north on this track? A. Yes, sir.

Q. How long had you been working there at that hole; how many days?

A. Why, I had just started there that morning.

Q. The hole was dug that morning?

A. No, the hole was dug the day before.

Q. Had they been doing work right along in that neighborhood; that kind of business along that track before? A. Yes, sir.

Q. Had you known of the cars passing there at frequent intervals? A. Yes, sir.

Q. Where were you when you were struck by the car, do you know?

A. I don't know.

Q. Are you able now to state where you were standing and what you were doing at the moment you were struck by that [61—29] car?

A. No, sir.

Q. What is your first recollection after that?

A. My first recollection was in the hospital.

(Testimony of Charles J. Schlieff.)

Q. Then the fact that you were struck and carried across the street and picked up and taken to the doctor's office and examined and taken to the hospital and treated for several days, you don't know anything about it? A. No, sir.

Q. How did you find yourself to be injured, if you were injured; state to the jury where you were hurt and what was the matter?

A. Well, after I came to in the hospital, I was all laced up and my leg in a plaster cast; they told me I had been struck by the street car.

Q. That is the first you knew what hurt you?

A. That is the first I knew what hurt me.

Q. Well, how were your ribs; did you have any trouble with your ribs. A. Yes.

Q. Which side? A. Right in here (indicating).

Q. Just stand up here and show the jury where you were hurt?

A. Right there (indicating).

Q. Just take your coat right off.

(Witness does as directed.)

Q. Right in there (showing)?

A. Right in there.

Q. Through the breast on the front side?

A. Yes, sir. [62—30]

Q. Did you have any pain back here (indicating)?

A. Not as much as in front.

Q. Did you have some back there?

A. Yes, sir.

Q. Where did you find yourself to be bandaged at that time; where were the adhesive plasters?

(Testimony of Charles J. Schlieff.)

A. All around.

Q. On the front and back? A. All around.

Q. Which leg was it that was broken?

A. Right here (indicating left leg).

Q. Where was the break?

A. Just above the ankle.

Q. What shape was your foot in?

A. It was all—

Q. Was that also in a cast?

A. It was also in a cast, yes, sir.

Q. Did you suffer any pain?

A. I did, for quite a while.

Q. How long did you remain in the hospital?

A. 10 days.

Q. Where did you go from there?

A. I went to my home.

Q. How did you get home?

A. Doctor McKinney took me home.

Q. In the automobile? A. Yes, sir.

Q. How long did you stay in bed after that?

A. About two months.

Q. Before you were able to be up? [63—31]

A. Yes, sir.

Q. How long was it before you were able to get around? A. About three months.

Q. Then were you able to walk naturally as you always did or did you have to use a crutch or stick?

A. I used crutches.

Q. How long did you go with a crutch?

A. Oh, 6 weeks or so.

Q. Has your foot ever recovered as good as it was

(Testimony of Charles J. Schlieff.)

before? A. No, sir.

Q. What is the matter with it?

A. It is always paining me.

Q. Whereabouts is the pain?

A. Right in there, through there (indicating top and inside of ankle).

Q. Take off your shoe and stocking and show it to the jury. While you are doing that, just state to me whether the bones of your leg above the ankle subsequently recovered all right; did they?

A. Why it don't seem to bother me so much.

Q. Is that the brace the doctor provided for you to wear? (Indicating leather brace.)

A. Yes, sir.

Q. Now, is this extra substance placed in the bottom of the shoe, is that what was prescribed by the doctor? A. Yes, sir.

Q. To hold up your foot? A. Yes, sir.

Mr. EMERY.—I want to show that to the jury. I cannot offer the shoe in evidence very well.

Mr. FALKNOR.—I would ask the witness to take off the other [64—32] shoe as well.

Mr. EMERY.—Yes, we will show both feet.

Q. This support—this portion of it is the support that is put into the shoe (indicating)? (Support shown jury.) A. Yes, sir.

Q. Now, show the jury on your foot where it hurts you when you stand on it.

A. Right through here (indicating inside and top of left ankle).

Q. Do you have pain there when you are not

(Testimony of Charles J. Schlieff.)

standing, or only when you press the foot?

A. When I have got my shoe on and got it laced up it isn't so bad but when it is barefooted—

Q. How about it when you lie in bed?

A. Oh, it rests pretty easy.

Q. Does it pain you when you take your shoe off?

A. All the time.

Q. Take the support away?

A. Yes, sir, I most generally always press it against the other foot to go to sleep.

Q. Where was the break here on your foot?

A. Right through here (indicating lower end of fibula).

Q. Was there any soreness around the bones on this side? A. Yes, sir.

Q. At the point here (indicating)? A. Yes, sir.

Q. How long did that continue?

A. Oh, it gets sore yet if I do not wear the brace.

Q. How about the bones around here (indicating), is that sore? A. Well, it isn't so bad.

Mr. FALKNOR.—I would like to have him stand up and have the [65—33] jurors examine the condition of the feet.

Mr. EMERY.—I intend to call some surgeons who examined him, this afternoon, and they will explain the exact condition of the man's foot. I will call them immediately this afternoon.

Mr. FALKNOR.—You have no objection to this standing up to show the jury whether or not there is any apparent difference in the flatness in his feet?

Mr. EMERY.—No, sir, I would like to have the

(Testimony of Charles J. Schlieff.)

jurors come and examine his feet.

Q. Stand with your weight on that left foot.

(Witness does as directed.)

Mr. FALKNOR.—Turn around so we can see whether there is any difference in the other foot. Put your weight on this foot. (Witness does as directed.)

Q. That pain still continues, does it?

A. Yes, sir.

Q. All this time? A. Yes, sir.

Q. Did you suffer pain just now when you were standing on that foot? A. Yes, sir.

Q. Mr. Schlieff, have you any trade?

A. Well, I mostly work at carpenter trade.

Q. What do you earn—what did you earn when you were in possession of your full faculties and were working regularly?

A. Three and a half and four dollars.

Q. During the time, and since January 23d, 1913, how much of the time were you able to work; how much of the time [66—34] were you unable to work on account of this injury?

A. Well, ever since I went to work, for a while I worked in a gravel pit until I went to work at form building on the street again.

Q. How long were you out of work on account of the injury? A. About four months.

Q. Were you able to work as well when you went back as you were before you were hurt?

A. No, sir.

Q. Have you been able to work as well since you

(Testimony of Charles J. Schlieff.)

were hurt as you were before? A. No, sir.

Q. Did you ever suffer pain in your foot before you were hurt? A. No, sir.

Q. Have you suffered it all the time since?

A. I have suffered it all the time since.

Q. I will ask you if you had a talk with the street-car company's agent about your injury before this action was commenced.

Mr. FALKNOR.—I object to that as immaterial.

Mr. EMERY.—The statute says we have a right to elect whether we will take in a case of this kind where we are hurt away from the plant of the employer by a third party—we have a right to elect whether we will take from the Industrial Insurance Commission or from the third party, but notice of that election must be given before suit is brought.

The COURT.—He can answer yes or no.

A. I have. [67—35]

Q. Who did you talk with?

Mr. FALKNOR.—I object as immaterial.

The COURT.—He may answer.

A. I don't know who the man was. I went up to the office.

Q. Where was it?

A. Up in the electric company's building; their office.

Q. At the office? A. Yes, sir.

Q. What did you say when you went in there.

Mr. FALKNOR.—Notice of election is not given to us in any event. It is given to the State, and so it is immaterial entirely.

(Testimony of Charles J. Schlieff.)

Mr. EMERY.—It does not appear in the statute which one.

(Argument.)

The COURT.—Was it written notice or oral?

Mr. EMERY.—No, sir, no written notice given to the company. I will find out. I don't know.

Mr. FALKNOR.—Well, since the statute in no way requires it—

Mr. EMERY.—Well, if you will waive it.

Mr. FALKNOR.—I do not waive it. I object to it as immaterial.

Mr. EMERY.—If the objection is construed as a waiver I have nothing more to say about it.

The COURT.—I am frank to say myself that I do not believe the defendant is entitled to the notice of election. The State is the one that is required—because there are certain other provisions in the law which the Industrial Commission requires.

Q. Did you give these people any written notice that you would take your damages from them, the street-car company? [68—36] A. No, sir.

Q. You did, however, talk with their claim agent? A. Yes, sir.

Q. In their office? A. Yes, sir.

Q. Did you tell him that you claimed your damages from them?

Mr. FALKNOR.—I object to that as suggestive and leading.

Q. Yes. What did you state to him, if anything, with regard to claiming damages for your

(Testimony of Charles J. Schlieff.)

injury, as to whom you would claim your damages from?

The COURT.—As stated a moment ago, I do not believe it is material but I will let him answer so as to avoid any error.

A. Every time I went up there they was talking Industrial Insurance Commission to me.

Q. What did you tell him about it?

Mr. FALKNOR.—I object as immaterial.

A. I didn't go up there to see him about it.

Q. You told him you did not come up there to see him about that? A. Yes, sir.

Mr. FALKNOR.—I object to that as immaterial.

The COURT.—The same ruling.

Q. What did you tell him?

A. I told him I came to see what they would do.

Q. You wanted the company to pay?

A. Yes, sir.

Q. Did you pay anything for your treatment in the hospital, other than what you paid the doctor?

A. Yes, sir.

Q. How much did you pay for that? [69—37]

A. Well, I can't say just what I paid.

Q. Well, about.

A. I think it was about \$20.

Q. To the hospital? A. Yes, sir.

Q. Did you have to have medicines other than what you paid the doctor? A. No, sir.

Q. Did you pay the doctor for any further treatments after that besides the \$50? A. No, sir.

Q. That covered the whole treatment?

(Testimony of Charles J. Schlieff.)

A. Yes, sir.

Mr. EMERY.—I think that is all at this time.

(At this time a recess was taken until two o'clock P. M.) [70—38]

(Upon reconvening at two o'clock P. M., the following proceedings were had.)

CHARLES J. SCHLIEF on the stand.

Direct Examination (Resumed).

(By Mr. EMERY.)

Q. I show you a picture, which is marked Plaintiff's Exhibit "D" and ask you if that is a picture of the place where the accident happened as it appears at this time. A. I think so.

Q. The manhole that appears immediately behind where the man is standing is at the point where the trouble occurred? A. Yes, sir.

Q. That is its present condition? A. Yes, sir.

Q. At the time of the accident was the left side of the street, or the left side of this picture in its condition as it is now? A. No, sir.

Q. It was unpaved then?

A. It was unpaved then.

Q. But the right side of the track was paved? [71—39] A. The right side was paved.

Q. The place where the man was standing would have been in the hole? A. Yes, sir.

Mr. FALKNOR.—Don't lead the witness quite so much.

Q. How far out did these ties extend from the rail? A. Right on the edge of the hole.

Q. Right on the edge of the hole.

(Testimony of Charles J. Schlieff.)

A. The rail was about the edge of the hole.

Q. The hole extended back practically under the ties? A. Back under the ties.

Q. Then as it—the brick work—was brought up, was it arched at the top? A. Yes, sir.

Q. The manhole was in the center of the hole as it appears here? A. Yes, sir.

Mr. EMERY.—We offer this in evidence.

Mr. FALKNOR.—No objection.

The COURT.—It may be admitted.

(Picture in question received in evidence and marked as Plaintiff's Exhibit "D.")

Q. In your testimony this morning you said you thought you paid the hospital \$20. Have you since refreshed your recollection about that?

A. It was somewheres between \$20 and \$30; somewheres along there.

Q. Between twenty and thirty?

A. Yes, sir. [72—40]

Q. Do you know what their charge is per week?

A. I do not.

Q. You were there ten days?

A. \$20 a week.

Q. You paid them at that rate for the time you were there? A. Yes, sir.

Cross-examination.

(By Mr. FALKNOR.)

Q. How long had you worked at the place where the accident happened? A. Just that day.

Q. That day? A. Yes, sir.

Q. How long had you been in the employ of

(Testimony of Charles J. Schlieff.)

Krogh and Jessen?

A. Between three and four months.

Q. Engaged in working on public improvements?

A. Yes, sir.

Q. Now, the accident happened something like about 10:20 that day, didn't it? A. Yes, sir.

Q. So you had gone to work at what time in the morning? A. Eight o'clock. [73—41]

Q. You had worked there at that place up until the time of the accident? A. Yes, sir.

Q. Now, you were assisting putting in this air shaft or manhole? A. Yes, sir.

Q. That was a part and parcel and is a part and parcel of the city water works? A. Yes, sir.

Q. And was connected with one of the city water mains? A. Yes, sir.

Q. That is in the street in that place?

A. Yes, sir.

Q. How long had you lived in the city previous to that time; the city of Seattle; about how long?

A. Living in the city, do you mean?

Q. Yes, how long had you lived in the city?

A. Oh, about eight years.

Q. Going back to the accident, I asked you about before; you said you had been working for Krogh & Jessen, contractors for the city, in the same kind of work for three or four months?

A. Yes, sir.

Q. You had assisted in similar work on the same street? A. Yes, sir.

Q. About how many air shafts or man holes had

(Testimony of Charles J. Schlieff.)

you assisted in putting in on the same street?

A. Why, that was the first one.

Q. That was the first one?

A. Yes, sir. [74—42]

Q. But you had been working on the same street?

A. Working on the same street.

Q. What was the line of your work previous to that time?

A. Well, we put in catch basins. This was supposed to be a gate chamber of the water main and these others were catch basins.

Q. You had been working for some considerable time on the same street? A. Yes, sir.

Q. Now, Mr. Schlieff, during that time and during the time you had been working on the street for several months previously, the street-cars were operating over the double track? A. Yes, sir.

Q. The cars going outbound or north bound on the easterly most track and the inbound cars on the westerly tracks? A. Yes, sir.

Q. They had been operated that way during the time you had been working there? A. Yes, sir.

Q. That is quite a trunk line, isn't it?

A. Yes, sir.

Q. And cars pass quite frequently over that line?

A. Yes, sir.

Q. Now, I understand that at the place where the accident happened, you could see in the direction from which the car came that hit you, about three blocks? A. Yes, sir.

Q. Assuming that there are three hundred feet to

(Testimony of Charles J. Schlieff.)

the block, then you could see something like 900 feet? [75—43] A. Yes, sir.

Q. Did you see this car? A. I did not, sir.

Q. Did you hear this car? A. I did not.

Q. You had not looked then, from the time the car came in view until you were hit? A. No, sir.

Q. You had not? A. No, sir.

Q. Your mind was engrossed with your work; you were thinking about your work? A. Yes, sir.

Q. And you were not thinking about the car?

A. No, sir.

Q. Now, let us see if I get the situation in mind definitely, Mr. Schlieff. Your part of the work was to carry the brick from B over to the manhole?

A. Yes, sir.

Q. And it was the duty of the man working in the manhole to lay the brick? A. Yes, sir.

Q. It was the duty of the other man who was assisting to mix the mortar? A. Yes, sir.

Q. The brick were over at B? A. Yes, sir.

Q. You brought the brick from B over to the manhole? A. Yes, sir.

Q. And then you would go back to B and get some more brick? [76—44] A. Yes, sir.

Q. Your line of duty was from the manhole to B and from B to the manhole?

A. And around the hole.

Q. But all you did was to hand the brick down to the man in the manhole? A. Yes, sir.

Q. How did you carry the brick across?

(Testimony of Charles J. Schlieff.)

A. Why, I wheeled them down to the edge of the hole.

Q. Wheeled them down to the edge of the hole with a wheelbarrow? A. Yes, sir.

Q. Then you lifted the brick out of your wheelbarrow?

A. Well, that time we dumped them out there and then we picked them out as we used them.

Q. You picked them up as you used them and then handed them to the man in the hole? A. Yes, sir.

Q. When you got the wheelbarrow load handed to the man in the hole you would go back to B and get more brick? A. Yes, sir.

Q. You had been working there for a couple of hours that morning doing that? A. Yes, sir.

Q. Now, if I understand correctly, this is the inbound track and from this track to the sidewalk the paving was complete. That is, the concrete was in and the asphalt was on top? A. Yes, sir.

Q. Well, from the westerly track to the sidewalk? [77—45] A. Yes, sir.

Q. And from this rail, that is the westerly rail of the inbound track to the easterly rail of the outbound track, and for a distance of a foot and a half on each side which the company is obligated to pave, the concrete foundation only was in? A. Yes, sir.

Q. The concrete foundation was in beyond the easterly rail something like a foot and a half?

A. Not at the hole.

Q. (By Mr. EMERY.) Not at the hole, you say?

A. No, sir.

(Testimony of Charles J. Schlieff.)

Q. Do you know how far the center of this hole is from the east rail? A. I do not.

Q. Have you ever measured it? A. No, sir.

Q. Don't you know that it is four feet, four and a half inches? A. I don't know.

Q. If it is four feet, four and a half inches—the center of the hole from the east rail, would you tell the jury that the company had not laid this concrete base a foot and a half beyond the easterly rail of the outbound track? A. Yes, sir.

Q. You would still say so? A. Yes, sir.

Q. Well, the ties project about two feet beyond the track, do they not? [78—46]

A. Well, I don't know about that.

Q. You don't know about that? A. No.

Q. Now, going a little further; that portion of the street that the city was obligated to pave and did pave beyond the easterly rail of the outbound track—there was no concrete in at all at that time out there, but it would simply would have been excavated so that the concrete could be laid? A. Yes, sir.

Q. But there was no concrete in? A. No, sir.

Q. So that extending within that—that portion east of the outbound track had been excavated; simply the dirt taken out? A. Yes, sir.

Q. Between the rails and between the tracks the concrete was in and on the opposite side of the street it had been completed and the asphalt on?

A. Yes, sir.

Q. At the time of the accident? A. Yes, sir.

Q. Now, will you step down here and let us see.

(Testimony of Charles J. Schlieff.)

I have a diagram here. Where was the mortar-box—was there any mortar-box on 55th north of the manhole? A. Yes, sir.

Q. In the vicinity of where I am pointing?

A. Well, it was somewhere there.

Q. Well, we will mark that M. That is the mortar-box near the center of the street? [79—47]

A. Yes, sir.

Q. Now, you notice just north of the manhole a number of—was there not a number of short boards three or four feet long from the east rail of the easterly track to the sidewalk; just to the north of the manhole over which your wheelbarrow came?

A. I don't know about that; I don't think there was anything there.

Q. Weren't there boards three or four feet long extending from the east rail to the sidewalk?

A. No.

Q. What was there?

A. I don't think there was anything there.

Q. How did you get your wheelbarrow down?

A. We dumped our brick way over here (indicating).

Q. And then carried them over? A. Yes, sir.

Q. Weren't there a number of short boards for passengers to get off the car and on the car and walk across that place?

A. There might have been before we started to work there.

Q. Weren't there at the time you worked there?

A. Not that I know of.

(Testimony of Charles J. Schlieff.)

Q. Not that you know of? A. No, sir.

Q. Did you not notice that in excavating for the hole that you had excavated underneath the ends of those short boards and that those short boards extended somewhat over the excavation underneath; did you notice that?

A. Well, I did not notice— [80—48]

Q. But the boards that were there, didn't they extend a short distance—the ends of them a short distance over that excavation?

A. Well, I couldn't swear about them planks being there at all.

Q. Will you swear those planks were not there?

A. They might have been there.

Q. Well, you were there and you ought to know whether there were planks there or not; weren't there short planks there just about as I have indicated on this diagram? A. I don't know.

Q. You won't say whether there were or were not?

A. No, sir.

Q. Will you say whether or not someone had excavated preparatory to putting in this air shaft, the dirt underneath the ends of those planks?

A. No, sir.

Q. You won't say whether that happened or not?

A. I don't know.

Q. Anyway you would dump the brick from your wheelbarrow over about where I mark X?

A. At the corner.

Q. And then you would carry the brick from X over to the manhole? A. Yes, sir.

(Testimony of Charles J. Schlief.)

Q. And then you would go back and get some more brick? A. Yes, sir.

Q. Your course then was from the manhole to the brick? A. Yes, sir. [81—49]

Mr. FALKNOR.—I now offer this in evidence and ask that it be marked as Defendant's Exhibit 4.

Mr. EMERY.—No objection.

The COURT.—Admitted.

(Diagram in question received in evidence and marked as Defendant's Exhibit 4.)

Q. Now, let me ask you this: If this is not a fact, taking this exhibit that I have just called your attention to, while you were engaged in handing the brick down to the man that was working in the hole at that time, you were standing approximately just to the north of the center of the manhole. That is right, isn't it? A. Yes, sir.

Q. And you stepped out onto the end of one of those teetering boards and lost your balance and jumped over onto the track and at that instant the car came down and struck you, isn't that true?

A. Well, that is something I can't say for I didn't see the car.

Q. Would you say that it is not true?

A. I wouldn't say whether it was or was not.

Q. You wouldn't say whether it was or was not? Well, now, let us see. You presented a claim to the State didn't you; you presented a claim to the State soon after the injury did you not, Mr. Schlief?

A. Yes, sir.

Q. Is that your signature? (Hands witness

(Testimony of Charles J. Schlieff.)

paper.) A. (No response.) [82—50]

Q. You don't deny your signature do you; isn't that the claim that you presented to the State?

A. I think it is.

Q. Did you not in this—

The COURT.—Let that be marked for identification.

Q. Calling the witness' attention to this identification number 5, I will ask you if you did not, over your own signature, on the 25th day of January, 1913, in the presentation of your claim to the State, in answer to the question which says, "Describe in full how the accident happened," state "Was working alongside car track and made a misstep and got in front of street car." Did you not so describe the accident? A. Yes, sir.

Q. What misstep did you make; you stepped on the teetering board and that caused you to start to fall and you jumped on the track in front of the car just as the car came along. That is it, isn't it?

A. Well, it might be it.

Q. Well, it is, isn't it?

A. Well, I can't say if them boards was there.

Q. Well, what caused you to make that misstep and jump in front of the car that you refer to in your own description, you don't know? A. Yes, sir.

Q. Now, you received from the State after you had presented this claim, two warrants, did you not?

A. Yes, sir.

Q. What did you do with them?

A. I kept them. [83—51]

(Testimony of Charles J. Schlieff.)

Q. You kept them? A. Yes, sir.

Q. You have got them now, haven't you?

A. Yes, sir.

Q. You received \$30 for the month of January, 1913? A. No, sir. I never received anything.

Q. Well, you received two warrants?

A. Yes, sir.

Mr. EMERY.—Well, he didn't get two warrants.

Mr. FALKNER.—Well, he says he did.

Q. And you have got them now?

A. They had to be signed.

Q. Speak a little louder; you have got them now?

A. Yes, sir.

Q. The State asked you to return them, didn't it; and you didn't do it? A. No, sir.

Q. You have still kept them? A. Yes, sir.

Q. And you had them at the time you started this suit? A. Yes, sir.

Q. You have had them all the time since, haven't you? A. Yes, sir.

Q. They were each in the sum of \$30?

A. Yes, sir.

Q. They were paid to you because of the claim you presented to the State?

A. They never was paid to me.

Q. They were delivered to you, weren't they?

A. Yes, sir.

Q. They were delivered to you because of the claim you presented [84—52] to the State, isn't that right? A. I guess so, yes, sir.

Q. How is that? A. Yes, sir.

(Testimony of Charles J. Schlieff.)

The COURT.—Did I understand that the warrants had not been paid?

Mr. EMERY.—No, your Honor. Counsel says they are warrants but they are not.

Mr. FALKNOR.—He has kept them but the State has asked that they be returned.

Mr. EMERY.—That is counsel's testimony and not the witness'.

Mr. FALKNOR.—I think that letter you have from the State will show.

The COURT.—Proceed. I just wanted to know if I understood the witness.

Mr. FALKNOR.—Yes. He kept them.

Q. What wages did you say you were earning at the time? A. Two dollars and six bits.

Q. I thought you said something like four dollars?

A. No.

Q. At the time you were earning \$2.75 a day?

A. Yes, sir.

Q. That is the wages you had been receiving for several months previous to the time of the accident?

A. Yes, sir.

Q. That is the amount—what wages are you getting now? A. \$3.00.

Q. You are getting twenty-five cents a day now more than you were receiving on the day of the accident and for several months previous? [85—53]

A. Yes, sir.

Q. What work are you doing now?

A. Setting forms.

Q. For whom? A. For Andrew Peterson.

(Testimony of Charles J. Schlieff.)

Q. Doing city work?

A. No, sir, county work.

Q. How long have you been working for Mr. Peterson? A. About two months.

Q. For whom were you working previous to that time? A. Messrs. Krogh & Jessen.

Q. How long were you working for Krogh and Jessen? A. About two months.

Q. Previous to that and following the accident, for whom were you working?

A. For J. T. Hardman.

Q. You are getting \$3.00 a day now?

A. Yes, sir.

Q. And you have worked for your present employer two months? A. Yes, sir.

Q. And previous to that you worked for Krogh & Jessen? A. Yes, sir.

Q. What did they pay you? A. \$3.00.

Q. You worked for them a couple of months; previous to that employment, you worked for whom?

A. J. T. Hardman.

Q. What did he pay you? A. \$2.50.

Mr. FALKNOR.—I offer the claim that he made to the State in [86—54] evidence and ask that it be marked Defendant's Exhibit Number 5.

Mr. EMERY.—Before it is admitted I wish to examine the witness about it. That is all.

The COURT.—Very well. I will reserve the ruling on its admission until you cross-examine.

Mr. FALKNOR.—I think that is all.

(Testimony of Charles J. Schlieff.)

Redirect Examination.

(By Mr. EMERY.)

Q. Mr. Schlieff, I notice that this exhibit last mentioned as Defendant's Exhibit 5, bears date the 25th of January, 1913. Did you write that paper of yourself or did you only write the signature to it?

A. I only wrote the signature to it.

Q. Did you know what the contents of it were when you signed it?

Mr. FALKNOR.—I object to that, your Honor. I think that where he signs a claim that he made to the State that he certainly ought to be bound by it.

Mr. EMERY.—Well, we will see.

The COURT.—Let him answer.

A. No, sir, I did not.

Q. Who wrote this paper? [87—55]

A. I couldn't tell you who wrote it.

Q. You say, "I can't tell you who wrote it"?

A. No, sir.

Q. Where were you when that was written?

A. I was in the hospital.

The COURT.—Speak louder.

A. I was in the hospital.

Q. Do you know now whether you stepped on the end of the board and made a misstep thereby stepping in front of the car or how you got on the track?

A. No, sir, I do not.

Mr. EMERY.—I have no objection to the exhibit then with this explanation.

The COURT.—It may be admitted as Defendant's Exhibit 5.

(Testimony of Charles J. Schlief.)

(Document in question received in evidence and marked as Defendant's Exhibit 5.)

Q. Now, I show you a partial voucher and letter with covers, envelopes, bearing the date March, 1913—March 24th, pinned together. Let them be marked Plaintiff's Exhibit "E," also a similar set of papers with the unsigned notice of election in it and duplicate, and a like voucher for the month ending February 23d, bearing date March 10th, which will be marked Plaintiff's Exhibit "F." I will ask you if these are the papers you meant when you say you got warrants from the State? A. Yes, sir.

Q. Did you ever sign or execute these papers or anything like it? [88—56] A. No, sir.

Q. And you did not return them? A. No, sir.

Q. Did you do that by your own account or on the advice of your counsel?

A. Most on account of the advice of the State.

Q. You have never been paid any sum whatever by the State? A. No, sir.

Mr. FALKNOR.—Don't lead your witness.

Mr. EMERY.—Well, he said he did not. He told you he did not. Now, I offer these in evidence, marked respectively Plaintiff's Exhibit "E" and "F."

Mr. FALKNOR.—No objection.

The COURT.—Admitted.

(Documents in question received in evidence and marked as Plaintiff's Exhibits "E" and "F" respectively.)

The COURT.—I might suggest as we go along

(Testimony of Charles J. Schlieff.)

that A, B, and D have not been offered in evidence.

Mr. EMERY.—Well, then I will offer all the exhibits that have been identified by the plaintiff at this time.

Mr. FALKNOR.—No objection.

The COURT.—They may be admitted.

(Plaintiff's Exhibits "A," "B," and "D," for identification received in evidence and marked Plaintiff's Exhibits "A," "B," and "D" respectively.)
[89—57]

Mr. FALKNOR.—If there are any which I have identified which I have not had admitted, I would like to have them admitted.

The COURT.—Yours are all admitted.

Mr. EMERY.—That is all.

Recross-examination.

(By Mr. FALKNOR.)

Q. Did you receive any letter from the Industrial Commission following the receipt of these warrants, asking that they be returned? A. Yes, sir.

Q. Is that it (handing witness letter)?

A. Yes, sir.

Q. That is it? A. One just like it.

Mr. FALKNOR.—We ask that this be received in evidence and marked Defendant's Exhibit 6.

Mr. EMERY.—I don't object to that.

The COURT.—It will be admitted. [90—58]

(Letter in question received in evidence and marked Defendant's Exhibit 6.)

Mr. EMERY.—This paper, marked Plaintiff's Exhibit "G."

(Testimony of Charles J. Schlief.)

Mr. FALKNOR.—I have no objection if you say that is a copy.

Mr. EMERY.—That is a copy.

The COURT.—It may be admitted.

(Document in question received in evidence and marked as Plaintiff's Exhibit "G.")

(Mr. Emery reads Exhibits "F" and "G" to the jury).

Q. (By Mr. FALKNOR.) Do you know who Clara May is? Do you know who she is?

A. Yes, sir.

Q. Who is she? A. She is my wife.

Q. Then your wife wrote this out; your wife wrote this out and you were not married at the time?

A. No, sir.

Q. But you have been married since? A. Since.

Q. Clara May was your intended at that time?

A. Yes, sir.

Q. And she came up to see you at the hospital?

A. Yes, sir.

Q. And you gave her the facts? A. Yes, sir.

Q. And she wrote it out? [91—59]

A. Yes, sir.

Q. You signed it?

A. I don't know as she wrote it out.

Q. Well, that is her handwriting, isn't it?

A. No, sir, that is not her handwriting.

Q. But she was there when you signed it—she witnessed your signature? A. Yes, sir.

Q. Who wrote it out? Who wrote it out?

Mr. EMERY.—He said he didn't know.

(Testimony of Charles J. Schlief.)

Mr. FALKNOR.—He is testifying.

The COURT.—Let the witness testify. Let him answer.

Q. Who wrote this out?

A. Well, if I could remember who was there I could tell you who wrote it out.

Q. But someone wrote it out at the hospital?

A. Well, Mr. Kumpf wrote it out.

Q. Mr. Kumpf wrote it out at the hospital?

A. I guess he was there; I wouldn't swear that he wrote it out at the hospital.

Q. You signed in the presence of your wife?

A. Yes, sir.

Mr. FALKNOR.—Yes. That is all.

(Mr. Falknor reads the last referred to exhibit to the jury.) [92—60]

Re-redirect Examination.

(By Mr. EMERY.)

Q. Before the time that you went to work for Krogh & Jessen what was your trade or occupation?

A. Carpenter work.

Q. What wages have you received at various times for services in that capacity here in this vicinity?

A. \$4.00.

Q. As high as \$4.00 a day? A. Yes, sir.

Q. Did you have any employment in that business at the time you went to work for them?

A. No, sir.

Mr. FALKNOR.—I object to that as immaterial and I move that this testimony be all stricken.

(Testimony of Charles J. Schlief.)

The COURT.—No, let it stand.

Mr. EMERY.—That is all.

(Witness excused.) [93—61]

[Testimony of Dr. Frank L. Horsfall, for Plaintiff.]

Doctor FRANK L. HORSFALL, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. EMERY.)

Q. State your name.

A. Frank L. Horsfall.

Mr. EMERY.—Do you admit his qualifications?

Mr. FALKNOR.—Yes.

Q. Doctor Horsfall, you are a practicing physician here in the city of Seattle, and also surgeon?

A. I am.

Q. You are also engaged in giving lectures on surgery and anatomy?

A. To the nurses at the Minor Hospital.

Q. Have you seen the plaintiff Charles J. Schlief within a few days and examined him?

A. I saw him at my office the other day.

Q. What day was it?

A. It was the end of the week; I think it was Saturday or Monday of this week; I have forgotten which.

Q. Have you examined the plate which is in evidence in this case; Plaintiff's Exhibit "B" which I now hand you? [94—62] A. I have.

Q. That plate was made by Doctor Snively at your

(Testimony of Dr. Frank L. Horsfall.)
suggestion with an X-ray machine?

A. Yes, sir, it was.

Q. I will show you a picture which will be marked Plaintiff's Exhibit "H"; is that a picture made from that same plate?

A. I believe it is. I had this in my office subsequent.

Q. Doctor, is that foot as shown by the plate in its normal state? A. I think not.

Q. What is the trouble with it?

A. Why, the arch of the foot is flattened.

Q. To what extent?

A. Why, very greatly and when the patient is under examination the arch appears to be obliterated.

Q. You examined the arch personally by manipulation, did you? A. I did.

Q. As well as by means of this plate? A. I did.

Q. What part of the bones of the foot; what particular bone of the foot is misplaced,—or bones?

A. Well, the bones that are most affected here are the scaphoid and cuneiform bones and the cuboid. Those bones are the bones that are in front of the astragalus and os calcis. To make it clear to the jury, I can show by this foot (referring to skeleton of foot).

Q. Well, explain that to the jury.

A. This is a human foot (indicating). When a man is [95—63] standing up the arch underneath, which is called the plantar arch; the bones that compose this arch are this bone (indicating) which is known as the scaphoid bone because of its

(Testimony of Dr. Frank L. Horsfall.)

fancied relation to a boat; the one on the outside on the left is known as the cuboid because of the long surface. These three bones (indicating) are known as the three cuneiform bones. There are a number of ligaments that hold the foot together from the top, but for the purposes of this evidence, the ones that are most important are the ones that form the sole, that are known as the plantar ligaments. There are really two arches to the foot. One arch is the inner arch and the other is the outer arch. As a matter of actual condition, it is all formed by one ligament that is split up as the finger of my hand, all belonging to the hand, but there are four fingers, so this ligament it has a great root that lies here (indicating).

Q. Here? (Pointing.)

A. Attached to the os calcis. It spreads out like a fan. A number of the fibres are attached down here to this metacarpal bone and some come right down to this bone here (indicating). From where it splits on the inner side of the foot and comes out again like the fan arrangement, is attached to a small bone on the first metatarsal, and also at this point at the end of this bone (indicating). That tendon, or one of the great muscles of the leg comes down from behind and passes right over here and attaches to this bone (indicating) and helps in the formation of this arch. When a man [96—64] is at rest, the arch is much more prominent than when he is standing on his foot because the weight of the body pushes the arch downward and flattens it out a little. When

(Testimony of Dr. Frank L. Horsfall.)

this arch is flattened—what we call a flat foot result—it is because these ligaments have been separated from their attachments at the bony surface in front or behind, or because they are cut with some sharp instrument in the center. These ligaments are entirely different things than the tendons or muscles themselves, because they are poorly supplied with blood and nerves and any portion of the body which is poorly supplied either with blood or nerves does not tend to heal, and when these ligaments are torn loose from their attachments they very rarely if ever become attached again, and the result is that the man walks with a completely flat foot and he has pain, because these bones are pushed out of their normal position. If that is normal (indicating) when they are pushed down, these bones are crowded down here and backward, and these surfaces are pushed forward against the bones that lie in front of it. This scaphoid bone which lies in front of this bone which forms the ankle joint is also pushed forward—

Mr. FALKNOR.—If your Honor please, it seems to me there ought to be a limit to this somewhere. This is all very interesting—

The COURT.—I think he is just about through.

Q. The large bone at the top is called the astragalus? A. Yes, sir. [97—65]

Q. And the os calcis or—

A. Or the calcaneum—

Q. Is the bone below? A. Yes, sir.

(Testimony of Dr. Frank L. Horsfall.)

Q. I think you said the bones involved in this injury were what?

A. The three cuneiform and scaphoid bone and possibly the cuboid.

Q. Now, does the misplacement of those bones show to your mind in the plate Exhibit "B"?

A. Yes, sir, it does.

Q. At the place—

A. Yes, it shows an obliteration of the joint surface.

Q. Does it also show in the picture now offered in evidence as Exhibit "H"?

A. Not as clearly as it does in the plate.

The COURT.—Is there any objection?

Mr. FALKNOR.—No.

The COURT.—It may be admitted.

(Picture in question is received in evidence and marked as Plaintiff's Exhibit "H.")

Q. Will these ligaments, in your opinion, ever attach to the bones to which they belong?

A. I believe not.

Q. Will the foot ever be normal in your opinion?

A. I believe not.

Q. In your opinion what will be the continued effect of that condition as to causing pain when the foot is stepped on [98—66] without support?

A. As this man grows older he is much more likely to have pain than now.

Q. Then you consider the injury a permanent one?

A. I believe it is.

Mr. EMERY.—Just come up here Mr. Schlieff and

(Testimony of Dr. Frank L. Horsfall.)

let the doctor explain this from your feet.

Mr. FALKNOR.—I would like to have both the shoes removed. I suppose you have no objection to Doctor Thompson coming up here?

Mr. EMERY.—No, not at all. If he can make any better lecture than Doctor Horsfall I want him to do it.

Q. Now, Doctor Horsfall will you point out to the jury the injury to the left foot;—or whatever one you find is injured?

A. Perhaps he had better turn around so the jury can see. Now, when this man stands up, this is almost completely gone (indicating). You cannot get anything more than a pencil under here (indicating). This is where the attachment of those ligaments that I spoke of takes place here (indicating) and comes upward here and this fan-like portion is attached here and here (indicating). Now, as the man puts his foot down and steps on it, those bones are driven forward and downward like that (indicating). So therefore they are pushed much closer to the ground than they otherwise would be and these joints are jammed tighter together. This joint is pushed closer against this bone and this bone is pushed further forward against this third bone (indicating) and these three bones are pushed further forward against these [99—67] three bones (indicating) that are anterior to it, and every time this man walks, as the joints are pushed further down, it causes him pain. Now, as he grows older, and the muscles, because of their age, have less elasticity and

(Testimony of Dr. Frank L. Horsfall.)

less contractual power, and therefore less power to support the weight of his body,—

Mr. FALKNOR.—I think we had that lecture a while ago—

The WITNESS.—I am not talking about the ligaments. I am talking about the muscles.

Mr. FALKNOR.—I thought you were going to point out from the foot.

A. I am doing this now in my own way and if you will let me do it my way we will get through. The jury will understand my idea and when Doctor Thompson does it it will be all right.

The COURT.—Proceed.

The WITNESS.—(Continuing.) As he grows older, the muscles will be less elastic and it will be flatter. Now when he steps on this bone—of course we cannot prove that he has pain but I take the man's word. If Mr. Falknor will take the trouble to hold this foot, he himself will find that these bones as he endeavors to manipulate them will give a feeling of resistance to his hand which the other foot does not give. There is more elasticity in this foot than there is in the injured foot. You yourselves can see that there is a difference. Not a very great difference but there is a difference in the arches of those two feet. When he stands up it is more marked than ever. If he stands up on top of that you can see it. [100—68]

Mr. FALKNOR.—Just have him stand up there.

(Mr. Schlieff does as directed. Jury examines foot.)

(Testimony of Dr. Frank L. Horsfall.)

Mr. EMERY.—That is all. You may cross-examine.

Cross-examination.

(By Mr. FALKNOR.)

Q. Doctor, is the arch on the left foot a little more prominent than the other?

A. What part of the arch; do you mean the entire arch?

Q. Isn't it deeper on the left foot than on the right? A. What part of the arch do you mean?

Q. I mean the highest part of the arch.

A. Anteriorly, because the man has a bone here—

Q. Isn't it higher in there than here (showing)?

A. Yes, sir.

Q. A little more arch in this foot than in the other? A. Yes.

Q. It is a little flatter than this one?

A. That is because of the fact that the bones are pushed a little farther forward in front.

Q. A little more arch in the left than in the right one?

A. Yes, but don't try to confuse me with the jury now.

The COURT.—I don't care anything about this. Isn't there [101—69] a little more arch in the left foot than there is in this right foot?

A. At this point, yes, but not down here (indicating).

Q. Now, Doctor, did you take an X-ray of the other foot? A. Yes.

Q. Where is it?

(Testimony of Dr. Frank L. Horsfall.)

A. Mr. Emery has it, I guess.

Mr. EMERY.—Right here it is. Do you want it?

Mr. FALKNOR.—Yes, and I would like to make this request. I would like to at some convenient place have Doctor Thompson take an X-ray of both of these feet this evening. We are not going to get through to-day.

Mr. EMERY.—Very well. That will be satisfactory.

Q. Now, this is of the right foot. Don't that show exactly the same conditions as you found in the left foot? A. I think not.

Q. You think not? A. Yes.

Q. Will you please take this and point out to the jury the difference between the two?

A. I do not believe that this—

Q. Will you demonstrate to the jury the difference between the two? A. I will try to.

Q. Take the other one.

The COURT.—Has this last one been marked as an exhibit?

Mr. EMERY.—It has not been offered.

Mr. FALKNOR.—I will offer this other one as Defendant's Exhibit 7.

The COURT.—Very well. [102—70]

(X-ray plate in question received in evidence and marked as Defendant's Exhibit 7.)

The WITNESS.—Now then, those two are not the same. This bone (indicating) is closer to its articulation than this one is (indicating), because this one is pushed further down. This bone appears

(Testimony of Dr. Frank L. Horsfall.)

higher with relationship to this bone than the point of this bone does here (indicating). In the next place this joint and this joint (indicating) have not the deep shadow between them at this point that those two have (indicating). Here the condition is again more marked. This is jammed down quite tightly; this cuneiform bone, than this one is. A difference of the level of those two bones and it is very easily seen.

Q. You never treated him? A. No, sir.

Q. You were called in when?

A. Why, either Saturday or Monday; I have forgotten which.

Q. For the purpose of becoming qualified to become a witness?

A. Yes, sir; to testify to the condition of the plates and the man's foot.

Q. By the plaintiff?

A. By the plaintiff's attorney.

Q. People have flat feet? A. They do.

Q. Without having suffered a great accident?

A. They do.

Q. Have both feet flat? [103—71]

A. They do.

Mr. FALKNOR.—Yes, that is all.

Redirect Examination.

(By Mr. EMERY.)

Q. Do you consider it necessary for this man to wear something to support this arch?

A. He will have to wear something if he wants to be free from pain.

(Testimony of Dr. Frank L. Horsfall.)

Q. Will that condition always continue?

A. I believe so.

Mr. EMERY.—Well, that is all.

(Witness excused.) [104—72]

[Testimony of Dr. J. H. Snively, for Plaintiff.]

Doctor J. H. SNIVELY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. EMERY.)

Q. Doctor Snively, what is your business?

A. I am a physician and surgeon.

Q. Do you make a specialty of any particular part of your profession?

A. I am specializing on X-ray work now.

Q. How long have you followed that business?

A. My profession?

Q. Yes. A. Since 1905.

Mr. EMERY.—Do you admit his qualifications?

Mr. FALKNOR.—Yes.

Q. Did you make two X-ray plates that are here bearing your mark?

A. Well, I made two plates for you.

Q. Of Mr. Schlieff's foot? A. Yes, sir.

Q. One of the right foot and one of the left?

A. Yes. [105—73]

Q. Is this plate Exhibit "B" made from the left foot? A. Yes, sir, this is the left foot.

Q. Did you make a picture from that?

A. Yes, sir.

Q. Are these the pictures that you made?

(Testimony of Dr. J. H. Snively.)

A. Those are the pictures, yes, sir. I think it is marked which is the right and which is the left.

Q. Are these the correct reproductions of the X-ray?

A. Yes, sir, they are. Without any retouching or anything.

Q. They are made directly from this man's two feet by you? A. Yes, sir.

Q. From your examination of the foot and from the X-ray picture of the feet, did you discover anything the matter with either foot?

A. Yes, I did.

Q. What was the trouble?

A. Well, the left foot has been subjected to an injury and the results of that injury are seen in the plate. The lower end of the fibula was broken; it has healed. Then the arch of the foot suffered an injury; probably a wrenching or crushing injury of the foot.

Q. What point on the fibula do you say was broken?

A. Well, as I remember about an inch—it is rather a longitudinal fracture extending from about two inches on the posterior surface downward and forward.

Q. As shown by the shadow on the picture?

A. Yes, sir.

Q. That has healed naturally? [106—74]

A. Apparently it has healed up perfectly sound and solid.

(Testimony of Dr. J. H. Snively.)

Q. Did you find that the external malleolus has been injured?

A. Yes, sir, it has been injured; the lower end of the fibula.

Q. And the man you found to be suffering with what is called in your terms, a flat foot?

A. Yes, sir.

Q. Did that condition prevail as to the right foot?

A. No, it did not seem apparent; it seems to be also more particularly a sub-acute inflammatory condition, involving the bones of the arch of the left foot. There seems to be a peri-articular swelling and a little cloudiness in the joint surfaces of those bones.

Q. In your opinion will the ligaments ever again attach themselves to those bones in a normal state?

A. They will, I think, in a way but not like they were before.

Q. What do you think about the injury with regard to its being permanent?

A. He will probably always be troubled more or less with that foot.

Cross-examination.

(By Mr. FALKNOR.)

Q. When did you first see Mr. Schlieff? [107—75]

A. The day that I took these pictures. I do not remember when it was.

Q. About when was it?

A. Day before yesterday.

Q. That is the first time you ever saw him?

A. Yes, sir.

(Testimony of Dr. J. H. Snively.)

Q. He did not come to you for treatment?

A. No, sir.

Q. He just came to you to have the X-rays taken of his foot? A. Yes, sir.

Q. And you understood you would appear and testify in regard to his foot?

A. There was nothing said about that.

Q. But you understood that you would be a witness?

A. No, sir. I did not know what he was brought there for. He was brought in there by Doctor Horsfall. I thought he was a private patient of Doctor Horsfall's.

Q. You knew he had some litigation?

A. Judge Emery was in to-day and said that he would probably call me as a witness this afternoon.

Q. Of course many people have flat feet?

A. Yes, surely.

Q. Do you think anyone looking at his feet as he stands up would recognize any difference in the flatness in them? A. Why, I think so.

Q. You think so?

A. That is, anyone who is accustomed to seeing those things.

Q. Both feet are flat, are they not? [108—76]

A. Why, I think both feet are a little flatter than the average foot would be; some arches differ a little. It might be natural for his arches to be; the right one is.

Q. It might be natural for the left one to be the way the left one is? A. Yes, sir.

(Testimony of Dr. J. H. Snively.)

Q. And it might be natural for the right one to be the way the right one is? A. Yes, sir.

Q. But you would not think that the left one was natural in the way it is? A. No, sir.

Q. Why do you draw that distinction?

A. Because the left one is injured; shows an injury which I don't think was there before the injury.

Q. The injury was to the small bone of the leg?

Mr. EMERY.—I object to that statement.

A. I think I testified to the small bone of the leg being injured.

Q. That is above the ankle?

A. Above the ankle; I also testified that the cuneiform bones had also suffered an injury.

Q. No line of fracture; no indication that any of them were fractured?

A. No, but I said they had suffered a tearing injury.

Q. The X-ray would not show that?

A. Well, the X-ray does show it.

Q. The X-ray simply shows the position of the bones?

A. I don't know what it would show. I know what it does show. [109—77]

Q. Isn't it possible to take these X-rays and measure to show which one of the arches is higher or lower? A. Yes, of course you can do that.

Q. Of course you can do that. Did you do that?

A. Yes, sir.

Q. Didn't you find there was absolutely no difference from the measurements on the X-ray plate as

(Testimony of Dr. J. H. Snively.)

to which was higher and which was lower?

A. You did not say—

Q. Just answer the question; didn't you find the arches were the same?

A. On the X-ray picture?

Q. Yes. A. No, not exactly the same.

Q. How much difference?

A. There isn't much difference shown on the plates, as to the flat foot.

Q. How much difference did you find?

A. I don't just remember now.

Q. You didn't find any appreciable difference?

A. Well, yes, there was a slight difference.

Q. But it was so slight—

A. These plates were taken with the man lying down. He did not have his weight on the feet.

Q. They both had the same weight on?

A. They did not have any weight on.

Q. Neither have any weight on; the bones were in repose?

A. The bones were in repose; both in the same position as nearly as possible.

Q. After you got the X-ray plates and measured them you [110—78] found that the arch is as high in one as the other if you took the plates and measured them?

A. It does not show a very great difference in the plate alone.

Q. If the arch was crushed the one that was crushed would necessarily and naturally be lower?

A. Not necessarily.

(Testimony of Dr. J. H. Snively.)

Q. Ordinarily, wouldn't it be?

A. No, I don't think so.

Q. It wouldn't be higher, wouldn't it?

A. I have taken a good many pictures of flat feet with people lying down that the foot will spread all over the floor with the weight on it.

Q. You did not take them standing?

A. No, sir.

Q. You don't know what the result would be standing on the floor?

A. I did not take them standing that way. They did not ask for them.

Q. You took them in repose; both of them?

A. Yes, sir.

Q. In repose, both of them—the arch in one is to all intents the same as the other by the measurements on the plate?

A. By the measurements on the plate, it is just a trifle lower than the other.

Q. Of course you could not tell whether he had any pain or not? A. No, of course not.

Q. You did not examine his pulse rate? [111—79]

A. I did not see the man until yesterday. I did not examine his pulse.

Mr. FALKNOR.—No. That is all.

Redirect Examination.

(By Mr. EMERY.)

Q. Could you detect by manipulation of the foot that there was a difference in the two arches?

A. Yes, there is a difference in the two arches.

(Testimony of Dr. J. H. Snively.)

Q. Are the bones in the left foot perfectly tight?

A. Yes, it is tight—*o* as I said, a slight peri-articular inflammation—sort of a sub-acute inflammation of the bones forming the arch of the foot. There is some thickening of the articular tissues and it shows that these ligaments have been subjected to an injury. In addition to that, this sub-acute inflammation in the region of these bones has produced a slight haziness or cloudiness of the joints and a slight rarefication of the bone. Those things are plainly seen on the plate by any person in the habit of judging.

Q. These things plainly appear upon the plate to an expert eye? A. Yes, sir. [112—80]

Recross-examination.

(By Mr. FALKNOR.)

Q. A little change in the angle makes a big difference, doesn't it?

A. No, there is no change in these plates.

Q. I say a little change in the angle makes a big difference, doesn't it?

A. Not necessarily so. There are some parts of the body that a change in the angle will show a difference. There are other parts that will not show a difference.

Q. An X-ray is a shadow?

A. An X-ray is a shadow picture, yes.

Q. And a slight change in the position of the body that throws the shadow, of necessity, affects the shadow, doesn't it?

A. Not necessarily so. There are some bones—

(Testimony of Dr. J. H. Snively.)

some portions of the body that that will not do. You can move your tube six or eight inches and it will not make any appreciable difference.

Mr. FALKNOR.—That is all.

(Witness excused.) [113—81]

[Testimony of Dr. Everett O. Jones, for Plaintiff.]

Doctor EVERETT O. JONES, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. EMERY.)

Q. State your name. A. Everett O. Jones.

Mr. EMERY.—Do you admit the doctor's qualifications?

Mr. FALKNOR.—I presume he is qualified. There are so many doctors I can't remember them all. I will admit he is qualified.

Q. Where do you live? A. Seattle.

Q. How long have you lived here?

A. Six years.

Q. Where is your office?

A. The Cobb Building.

Q. What school are you a graduate of?

A. University of Pennsylvania.

Q. How long have you practiced your profession?

A. Twenty years.

Q. Medicine and surgery?

A. Yes, sir. [114—82]

Q. Are you in general practice here at this time?

A. Well, my practice is devoted to surgery. I am not doing medical practice.

(Testimony of Dr. Everett O. Jones.)

Q. You are devoting your practice to surgery; how long have you followed surgery particularly?

A. Six years.

Q. Have you seen and examined the plaintiff, Mr. Schlieff, in this case? A. I have.

Q. As to the effect of the injury upon his foot?

A. I have.

Q. When did you make the examination?

A. About three days ago.

Q. From your experience in your profession are you able to tell whether from your examination the left foot of Mr. Schlieff has been subjected to an injury or not?

A. There was a flat foot on the left side.

Q. What do you mean by a flat foot?

A. Flattening of the arch; broken arch in other words.

Q. Did you find that condition prevailing in the right foot at all?

A. No, no, I could not say there was a broken arch on the right foot.

Q. What was it; a normal arch on the right foot?

A. Yes, sir.

Q. But the left one was different?

A. Yes, sir, there is a distinct difference.

Q. How did you make the examination; how carefully?

A. Why, I made the customary physical examination.

Q. With your hands? [115—83]

A. With my hands.

(Testimony of Dr. Everett O. Jones.)

Q. Manipulating the bones and felt them closely?

A. Yes, sir.

Q. Was that examination sufficient to enable you to testify that the man had a flat arch or a broken arch in his left foot? A. Yes, sir.

Q. What is the condition of the tendons in such a case and what is the condition of that case—the tendons and ligaments, I mean?

A. The ligaments on the under surface of the foot—that is the under surface of the foot have been—are now in the condition of being elongated; that is stretched out and lengthened, so that when the weight of the body comes on the arch of the foot, it allows it to flatten; straighten out.

Q. Not in a normal condition?

A. Not in a normal condition.

Q. Will they ever regain their normal condition in your opinion? A. In my opinion, not.

Q. In the condition in which you found them what will be the natural effect when the man walks on his foot as to sensibility?

A. The effect of flat foot is to cause pain.

Q. Can that be relieved by any natural means or must you resort to artificial means entirely?

A. It can be relieved to quite considerable an extent by wearing a plate which will hold the arch up and in a measure take the place of— [116—84]

Q. Put in the bottom of the shoe?

A. Put in the bottom of the shoe, or a steel spring; something to prevent the arch from dropping when the weight comes on the foot.

(Testimony of Dr. Everett O. Jones.)

Q. Doctor Jones, is that difference in the elevation of the bones; does that necessarily have to be very great to produce flat foot?

A. No, it is usually the case that the smaller grades of flat feet—that is when the amount of dropping is small the pain is more; that is a different proportion to the amount of pain that is seen when the arch is entirely down.

Q. Can you explain why that is?

A. Well, it is due to the pull on the ligaments. When the arch is down, absolutely flat, so that it stays down, why the ligaments are stretched out so far that there is not additional pull on them when the weight is borne.

Q. In this case is the arch entirely down or only partially down?

A. No, it isn't entirely down. It is principally noticeable when the man bears his weight on the foot.

Q. Which of the bones there are in your opinion involved in the injury?

A. It is the so-called inner arch. It is this arch here that includes the cuneiform and scaphoid and this part of the os calcis; from this point to that point (indicating).

Q. That is from the upper extremity of the right to the left tarsal?

A. As the foot is at rest the arch stands in about that [117—85] angle (indicating); as weight is borne on it it tends to drop this way and that brings these articulating surfaces of the bones here close

(Testimony of Dr. Everett O. Jones.)

together on the top and a little apart from the bottom; and that is the mechanism for the production of pain.

Q. That is not a natural or normal condition?

A. No.

Q. Will that condition remain permanent, in your opinion?

A. In my opinion it will. There is no tendency in that condition to spontaneously repair itself in any way. When the ligaments are once elongated and stretched out and torn they tend to stay that same length.

Q. And the man will always be that way?

A. Yes, sir.

Q. Did you examine the X-ray pictures taken from the foot?

A. No, sir, I haven't seen them.

Q. Now, these are marked left and right.

Mr. FALKNOR.—I would have preferred if he had not indicated which was the left and which was the right.

Mr. EMERY.—They are marked right on the side in plain English. Probably he couldn't tell if they were not.

Q. Did you notice anything shown by the picture of the foot there indicating any injury to the arch?

A. Why, the only thing I see is a little roughening of the joint surfaces between the tarsal bones and a little thickening—other than that I do not see anything; a little irregularity in the outline of the joint surfaces.

(Testimony of Dr. Everett O. Jones.)

Mr. EMERY.—That is all. [118—86]

Cross-examination.

(By Mr. FALKNOR.)

Q. Both look about the same height, don't they?

A. There is very little difference.

Q. Now, when you speak of a flat foot, it is a foot where the arch is crushed down; or the arch is somewhat obliterated by the foot being flattened?

A. That is the terminal stage of the flat foot, when the arch is entirely broken.

Q. And when the arch is broken those bones are practically on the surface; there is very little arch underneath, isn't there?

A. I don't know that I get your point.

Q. Well, when we have a flat foot, it is when those bones are down on a level with the balance of the foot? A. You mean the arch is obliterated?

Q. Yes.

A. Yes, that is the terminal; that is the last stage.

Q. Now, these pictures as far as you can detect from your eye, the arch is the same in both of them?

A. Very nearly.

Q. So if one is flat the other is flat, isn't it?

A. That doesn't necessarily follow.

Q. It would follow from the indication of the X-rays, wouldn't it?

A. Well, the X-ray does not signify much as to the condition [119—87] of the arch except when the arch has been entirely obliterated and broken down.

(Testimony of Dr. Everett O. Jones.)

Q. It shows how high these bones are above the balance of the bones, don't it; the X-ray?

A. In that particular plate, yes, but from the standpoint—

Q. It shows how much arch there is in each foot?

A. No, that is a different question.

Q. Can't you tell how much arch there is in that foot?

A. No, sir, it takes more than an X-ray picture to make a clinical diagnosis.

Q. Well, taking the X-rays, everything else being equal, you would say there was?

A. No, taking the X-rays alone, I would not venture an opinion at all.

Q. You cannot tell anything from the X-rays?

A. No, sir.

Q. The X-rays do not indicate anything?

A. They indicate something, yes, but their indication has to be taken in conjunction with other findings and not by themselves.

Q. Did you ever treat this man?

A. No, sir.

Q. When did you see him?

A. About three days ago, I testified.

Q. He came to you for the purpose—

A. Of an examination.

Q. For the purpose of an examination so you could appear and testify?

A. They came for my opinion as to the condition of his foot. [120—88]

Q. And you understood you were to appear and

(Testimony of Dr. Everett O. Jones.)

testify as a witness for him?

A. I told him I would do so if I was asked.

Q. But you never treated him? A. No, sir.

Q. Never had occasion to examine him?

A. No, sir.

Mr. FALKNOR.—That is all.

Q. (By Mr. EMERY.) Your testimony has not been changed by the fact that you were told that you would be asked to give it, has it? A. No, sir.

Mr. EMERY.—That is all.

(Witness excused.) [121—89]

[Testimony of John Kroon, for Plaintiff.]

JOHN KROON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. EMERY.)

Q. Mr. Kroon, where do you live?

A. 34th Avenue South.

Q. What is your business?

A. I am a bricklayer.

Q. Were you engaged in your bricklaying in January last at the time Mr. Schlieff was hurt?

A. Yes.

Q. Where were you at that time? A. What?

Q. Whereabouts were you; down in the hole?

A. I was down in the hole.

Q. Laying that brick in that gateway?

A. Yes, sir.

Q. How long had you been to work there that morning before he was hurt?

(Testimony of John Kroon.)

A. Well, I don't know—maybe—well, I don't know how long, maybe one hour or so.

Q. Now, how high had you got the wall laid up at the time [122—90] the accident happened?

A. Oh, I only put in a few bricks; two or three course or something.

Q. Mr. Schlieff was bringing the brick and mortar to you? A. He handed the brick to me, yes.

Q. He had to hand them down to you and you laid them? A. Yes.

Q. Did he have to pass around and in different places around the hole or did he stand in one place?

A. He stand in the place right before me, handing the brick.

Q. When you turn around, following around the course, he had to walk around the hole, didn't he?

A. No, he stand in the same place.

Q. Will you please come down here. Now, how large was that hole? A. This is about six feet.

Q. About six feet in diameter?

A. Yes. The brick was four feet inside.

Q. The brick was four feet inside? A. Yes, sir.

Q. The hole was near the track? A. Yes, sir.

Q. He had to stand on the outside of the hole?

A. Yes, I stand in the hole.

Q. Down in the bottom?

A. Down in the bottom.

Q. And you had to bend over and lay the brick?

A. Yes.

Q. Where was he accustomed to stand to pass the brick to [123—91] you?

(Testimony of John Kroon.)

A. He stand right on the edge of the hole.

Q. Which side; which way?

A. The north side of the hole.

Q. The north side of the hole, here (indicating)?

Mr. FALKNOR.—Let him mark it.

Q. Which way would you say he was?

A. I don't know; is this north?

Q. That is north?

A. On that side (pointing).

Q. Did he ever stand here between the hole and the track?

A. No, he stand right on this side (indicating).

Q. Now the hole itself, how near did that come to the rail; the edge of the hole; the edge of the excavation?

A. It comes, I don't know; maybe three feet; I don't know. It came under the ties.

Q. It came under the ties, the edge of the hole?

A. The edge of the brick comes under the ties.

Q. The ties stick out from the rail over the hole?

A. Yes. They dug the hole underneath the ties.

Q. They dug the hole underneath the ties?

A. Right under the ties.

Q. Do you know about any plank being across the street there?

A. There was a plank laid across there from the sidewalk across.

Q. From the sidewalk across? A. Yes, sir.

Q. How close were those planking to the hole?

A. They was right in this end over the hole. Maybe a few inches over (indicating).

(Testimony of John Kroon.)

Q. Were these plank laid crosswise of the street or lengthwise? [124—92] A. No, crosswise,

Q. Crosswise of the street; that is this way?

A. No, crosswise (indicating). This way (indicating).

Q. Came right close to the hole?

A. Yes, sir.

Q. How long were those plank?

A. Oh, I don't know.

Q. They laid right down flat on the surface?

A. Yes, sir.

Q. Was the asphalt put on there then?

A. No, there was nothing put on.

Q. No concrete there? A. No, not there.

Q. Never had been put on?

A. It isn't in yet.

Q. In fact, this was being newly paved here?

A. Yes, there was concrete up along the railroad.

Q. Concrete up along the railroad in here (indicating)? A. Yes, sir.

Q. But not in here at all (indicating)?

A. No, sir.

Q. Was there a pile of dirt anywhere there; where was the dirt piled?

A. There was dirt piled on that side (indicating).

Q. Any piled here (pointing)? A. No, sir.

Q. That had been thrown out of the hole?

A. No, sir, right over here (indicating).

Q. Where were the ties put that you had over the hole at [125—93] night; where did you throw them; you covered the hole at night, didn't you?

(Testimony of John Kroon.)

A. No, we dug the hole and we covered the hole with ties at night-time and we took them out and threwed them out on the parking strip.

Q. On the dirt pile?

A. No, on the parking strip.

Q. Did you see the car at the time it struck Mr. Schlieff?

A. Yes, at the time it struck him I saw it.

Q. Where was he at the time it struck him; Mr. Schlieff?

A. He stepped right up on the railroad track.

Q. Stepped right upon the railroad track?

A. Yes, sir.

Q. That was on which side of the railroad track?

A. The east side of the railroad track.

Q. Did he see the car; could you tell whether he saw the car or not?

A. I don't know as he saw it. I don't know.

Q. How high was your head up there from the bottom of the hole?

A. Oh, the hole is about two feet deep; maybe a few inches more.

Q. Then your head was above the level of the street? A. Yes, sir.

Q. Did you see the car before it struck him?

A. No.

Q. Did you hear any bell rung?

A. Yes, at the same time he stepped on the railroad track; on the car track, I heard the bell ring and I turned my head to the left and saw the rear end of the car coming [126—94] here because I was

(Testimony of John Kroon.)

three or four feet distance ahead of the car.

Q. You say at the time the bell struck he was three or four feet ahead of the car?

A. No. When I heard the bell ring I turned my head to the left and saw the car and it was just the same time he stepped on the railroad track and then I saw the car right there (indicating).

Q. How far would you say the car was from the hole when you heard the bell ring?

A. I don't can tell that.

Q. Did you hear it ringing as it approached some distance back?

A. Yes, I heard it ring and I turned my head and I see the car right there beside me.

Q. Was it right there at the hole?

A. Yes, right beside me.

Q. Did you hear it ring before it got to the hole?

A. No.

Q. How many times did you hear it ring?

A. One time.

Q. Could you distinguish any space of time between the stroke of the bell and the time that the car struck Mr. Schlieff?

A. Oh, it's hard to tell. It is pretty near just the same. It is hard to tell.

Q. How far did it carry him?

A. Oh, the car struck him and maybe it throw him ahead on the track 25 feet or something. I couldn't tell.

Q. What part of the car struck him first?

A. Well, he stepped on this left foot—the right

(Testimony of John Kroon.)

foot on [127—95] the railroad track, and he turned around and the car struck him maybe on the shoulder or something on that side. I couldn't see because he turned around.

Q. Did you see where the fender hit him?

A. Yes, the fender hit him and took him off of the track, and the next time the car touched him?

Q. Then the car struck him twice?

A. Yes, sir. He stand on the track.

Q. The next time the fender struck him on the ankle?

A. Yes, sir, the next time he took him and swept him off of the track.

Q. Did you help pick him up?

A. No. Mike Hanson and the Inspector they pick him right away and carried him into the store house. I don't know.

Mr. EMERY.—That is all.

Cross-examination.

(By Mr. FALKNOR.)

Q. Now, if I understand you Mr. Kroon you were in the hole? A. What? [128—96]

Q. You were in the hole?

A. Yes.

Q. He was standing to the north of the hole?

A. Yes, on the north side.

Q. About there (pointing)?

A. Yes, about there.

Q. Well, I will mark an o, a capital O there. That is about where he was standing?

(Testimony of John Kroon.)

A. Yes, he was there standing right there beside the hole.

Q. He was handing brick to you down in the hole?

A. Yes, sir.

Q. About how far was he from the track when he was standing there?

A. Oh, about three feet or something like that. He stand about in the center.

Q. He was standing about three feet from the track so if he remained standing there the car would have gone by and not hit him? A. I guess so.

Q. If he had not stepped on the track the car would not have hit him? A. No.

Q. You heard the bell of the car ring?

A. Yes.

Q. And you saw him step on the track?

A. He stepped on the track before I heard the bell.

Q. Now, did you see what caused him to step on the track? A. What?

Q. What did he do that caused him to fall over on the track; what did Schlieff do that caused him to fall over [129—97] on the track?

A. He stepped over on the track.

Q. What caused him?

A. He stepped on the end of the plank and the plank jumped—he jumped right up on the track, so he don't fall in the hole.

Q. Now at that time, just the moment he got on the track, how near was the car to him?

A. I did not see. Right when he stepped on the

(Testimony of John Kroon.)

track the bell ring and I turned my head to the left.

Q. The car was there about the same time he stepped on the track? A. Pretty near.

Q. Four or five or six feet from there?

A. I don't know; I don't see the car but I heard the bell ring.

Q. It was just a few feet?

A. Yes, I didn't see the car until it was opposite me and I heard the bell ring.

Q. When he stepped on the teetering board and jumped on the track you heard the bell?

A. Yes.

Q. And you looked and the car was right there?

A. Yes.

Q. Well then, within three or four feet of him?

A. Yes, at the time when I saw the car he was not more than three or four feet ahead of the car.

Q. If he had not taken that step or jumped the car would not have hit him? A. No. [130—98]

Q. And the car went about how far?

A. Well, I don't know. The car passed the crossing. It was the rear end before it stopped. Probably it run over 60 feet or something like that.

Q. Did you holler at him? A. No.

Mr. FALKNOR.—That is all.

(Witness excused.) [131—99]

[Testimony of ——— Kumpf, for Plaintiff.]

——— KUMPF, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

(Testimony of ——— Kumpf.)

Direct Examination.

(By Mr. EMERY.)

Q. What were you doing at the time this accident happened? A. Inspector for the city.

Q. Working for the city? A. Yes, sir.

Q. Inspector? A. Yes, sir.

Q. You were there at that place in pursuance of your duties as an inspector? A. Yes, sir.

Q. Where were you standing at the time Mr. Schlief was hit?

A. About four feet away from the work.

Q. Somewheres near that corner?

A. Well, I couldn't say, I can't see that far very well.

Q. Well, indicate it.

A. Well, I was standing about here (indicating).

Q. Make a mark there.

(Witness marks.)

Mr. FALKNOR.—The witness marks X over a little circle on [132—100] this exhibit.

Q. How big was that hole?

A. The excavation?

Q. Yes. A. About six feet.

Q. How near was you to the edge of the hole?

A. Well, I said I was about four feet from the work.

Q. Where was Mr. Schlief with reference to where you were? A. Well, he was about three feet.

Q. Between you and the track? A. Yes, sir.

Q. What was he doing?

A. Why, he was in pursuance of his work there.

(Testimony of ——— Kumpf.)

Q. Passing brick down to the mason?

A. Yes.

Q. Did you see him at the time he was struck?

A. I did.

Q. Did you see the car coming?

A. I saw it when it was close to him there.

Q. Did you hear any bell rung? A. No, sir.

Q. Had you heard any bell rung up to that time from that car? A. No, sir.

Q. As the car approached the place where they were working, did it ring any bell?

A. I didn't hear any.

Q. If it had rung one, you would have heard it?

A. I probably would.

Q. Was there any unusual noise going on around there to [133—101] prevent you hearing it?

A. No, sir.

Q. It was a good paved street?

Mr. FALKNOR.—I object to your leading the witness. Let the witness testify.

The COURT.—Let the witness testify.

Q. What was the character of the street on which the car was coming as to whether it was paved or not? A. On which side?

Q. To the south as it approached the hole?

A. Well, the extent of the work was to the east and west. The west side of the street was paved and the east side was not.

Q. Then the street ran north and south, didn't it?

A. The street—14th Avenue, yes.

Q. And the car was coming from the south on

(Testimony of ——— Kumpf.)

14th Avenue? A. Yes, sir.

Q. Now, in the direction as the car was coming, as it came along, did it come over a paved street or not?

A. The outbound track was not paved.

Q. The outbound track was not paved, but the incoming track was paved, was it? A. Yes, sir.

Q. Do you know about the size of that car?

A. About the size of it?

Q. Yes.

A. It was the standard car. I don't know what the size of it was.

Q. Was it a Ravenna Park car or a Cowan Park car? A. I don't remember.

Mr. EMERY.—Have you got the size? [134—102]

Mr. FALKNOR.—It was one of the 604 Cowan Park cars; I think they are all the same in size.

The WITNESS.—Well, it was a single ender.

Q. It was a single ender; that is, the motor was in one end? A. Yes, sir.

Q. And the entrance was in the other end?

A. It was a car that necessitated going on a Y to permit it coming back on the inbound track.

Q. The Y was how far north from where the accident happened?

A. The nearest Y was at Cowan Park.

Q. How far north was that? A. Two blocks.

Q. Were you watching Mr. Schlieff while he was at work there at that time?

A. Why, I didn't have any special notice of him;

(Testimony of ——— Kumpf.)

I saw him; I was looking after the work.

Q. Did you see him step upon the track?

A. I did not.

Q. Where was he when you first saw him in connection with the accident?

A. He was on the track.

Q. How far away was the car from him?

A. Between five and ten feet.

Q. Did you hear any bell at that time?

A. I did not.

Q. Did he know that the car was there?

A. I couldn't say that he did.

Q. From his actions? [135—103]

A. I didn't notice anything to that effect.

Q. How far was he from the hole?

A. How far was he from the hole?

Q. Yes.

A. The extremity of the hole?

Q. Yes, the nearest point of the hole.

A. Why, he was about three feet.

Q. Was that in the place where he ordinarily went—passed—in the course of his work?

A. Why, I don't know; I didn't take any special notice as to where his course was in going to the work.

Q. Well, he had some brick here, didn't he, up here where he was getting his brick (indicating)?

A. He had brick on the east side of the track.

Q. And he passed from the hole around here across the pavement to the track?

A. Why, I didn't notice that he did.

(Testimony of ——— Kumpf.)

Q. You didn't notice which way that he went?

A. No, sir.

Q. Did you notice that he fell on any projecting plank there? A. I did not.

Q. Did you shout to him?

A. I did, but he paid no attention to it.

Q. Did he pay any attention to your shout?

A. Why, I don't know that he did, because the car hit him just about the time that I shouted.

Q. Then you must have shouted the instant that you saw the danger?

A. I think close to that time.

Q. Is this place up the track toward the south from which [136—104] the car came a clear space?

A. No, sir, the street comes over on a vertical curve.

Q. On a vertical curve?

A. On a vertical curve.

Q. What do you mean by that?

A. It is one that bows over.

Q. I understand, but how far back this way could the motorman, standing upright in the front window of the car, see parties working there?

A. How far could he see that?

Q. Yes.

A. Well, I guess about 600 feet away.

Q. 600 feet at least? A. Yes, sir.

Q. Except for the vertical curve the track was straight?

(Testimony of ——— Kumpf.)

A. The track was straight but it was not on a straight grade.

Q. Excepting, I say, for the vertical curve, the track was straight, with that exception?

A. Yes, sir.

Q. Was it coming downgrade somewhat?

A. Yes, sir.

Q. A slight grade or a very heavy grade?

A. About three present.

Q. This picture is a very fair representation of the street except that the street where the man stands was unpaved at that point, was it not? A. Yes, sir.

Q. Looking past the man's head, do you see a car there (indicating)? [137—105] A. I do.

Q. Now, a motorman coming on that car could see for at least 600 feet any person on the track, could he not? A. Yes, sir.

Q. The hole in which the manhole that the brick work was being constructed—how near was that dug to the rail of the track?

A. Well, properly it was dug about within a foot or two of the extreme east track. The vibration of the cars had caused the dirt to fall and the excavation was underneath the ties.

Q. And the plaintiff stood between the hole and the rails?

Mr. FALKNER.—Now I object to that as leading.

Q. Could a man stand between the rail and the side of the hole?

A. Well, if you say what portion of the rail.

Q. At the point nearest the rail?

(Testimony of ——— Kumpf.)

A. No, he could not.

Q. Why not?

A. Because that was a portion of the excavation;
a portion of the hole.

Q. How fast was the car going when you saw it?

A. I should judge between 15 and 20 miles an
hour.

Q. Did the car stop perceptibly before it struck
him? A. Before it struck him?

Q. Yes. A. Not that I noticed.

Q. Did you see what the motorman did?

A. No, sir, I did not.

Q. You watched the body, did you or did you not?
[138—106] A. I watched Mr. Schlieff.

Q. Now, just describe what happened to him?

A. Why, as the car hit him the fender of the car
hit him first and he bounded back and his head hit
the body of the car. He seemed to bound away from
the car and the car struck him a second time and as
the car started to slow up he fell off; the car pro-
ceeded about three feet further.

Q. He fell on which side of the car?

A. On the right side going out.

Q. On the east side? A. On the east side.

Q. About how far did the fender go after it struck
him before it stopped; in other words, how far did
it pass? A. About three or four feet.

Q. That is, after it first struck him; then after he
was on the fender, how far did the car go before it
stopped? A. 15 or 20 feet.

Q. You helped pick him up? A. I did.

(Testimony of ——— Kumpf.)

Q. Was he unconscious at that time?

A. Yes, sir.

Q. You did not know the extent of his injuries?

A. I did not.

Q. Did you see him afterwards at the hospital?

A. I did.

Q. When?

A. I don't know the exact length of time; about two weeks after he was hurt.

Q. Had he recovered his consciousness then?

[139—107] A. He had.

Mr. EMERY.—That is all.

Cross-examination.

(By Mr. FALKNOR.)

Q. The car then came to a stop in about 15 or 20 feet after it hit him? A. It did.

Q. You did not hear any bell at all?

A. I did not.

Q. Even at the time of the impact?

A. I did not.

Q. Then you do not remember of hearing any bell?

A. I say I didn't hear any.

Q. Now, you gave us a statement at the time; the same day of the accident didn't you; you gave the Company a written signed statement?

A. Yes, sir.

Q. And in answer to the question "Was a bell or gong ringing at the time" you answered "I don't know," didn't you? A. I think I did.

Q. And you don't know now, do you, whether the bell was ringing or not? [140—108]

(Testimony of ——— Kumpf.)

A. I say I didn't hear any bell.

Q. But in answer to the question we asked you, you stated at that time, on the same day, that you didn't know whether the bell was ringing or not; your recollection then was as good as it is now?

A. I do not draw any close distinction between saying that I did and I thought I did not.

Q. Anyway, on the same day you answered that you did not know?

Mr. EMERY.—That is the third time he has admitted that.

Q. When he asked you on the same day you answered that you didn't know?

Mr. EMERY.—I object to this as an unnecessary repetition.

Mr. FALKNOR.—I want a definite answer.

Q. That is correct, isn't it? A. Yes, sir.

Q. Now, did you prepare the claim that he signed that was sent to the State? A. I did not.

Q. That is not in your handwriting?

A. No, sir, I didn't write it.

Q. Were you present when it was written?

A. I was not.

Q. You also in this statement that you gave us on the same day, stated that he stepped onto the track when the car was about ten feet from him, did you not? A. Yes, sir.

Q. That is correct?

A. Well, if I was to give it more serious thought, I would say it was not. [141—109]

Q. Well, you did give us a statement to that ef-

(Testimony of ——— Kumpf.)

fect on the same day. A. I did, yes, sir.

Q. That he stepped on the track—"I don't know whether he was trying to step east or slipped on a plank": You didn't know at that time what caused him to do it, whether he slipped or was trying to step east, but he stepped on the car track when the car was about ten feet away?

A. I saw him on the track.

Q. You did give the statement as I have indicated on that day?

A. I did give a statement, yes, sir.

Q. You did see the car then when it was ten feet from him? A. Between five and ten feet.

Q. At that time he stepped on the track?

A. I saw him on the track.

Q. You saw him step on the track?

A. No, sir, I did not.

Q. You gave us a statement to that effect?

A. If I gave a statement at that time it might have been as I thought—

Q. But what I am trying to get at, your recollection would, of necessity, be better than it is a year after? A. Not necessarily.

Q. Well, ordinarily?

A. Well, not in this case.

Q. You think in a year from now your recollection would be better than the written statement given the company that day? [142—110]

A. The condition of a man's mind at that time when it was taken up with the thought of the accident—the thought of the man's condition.

(Testimony of ——— Kumpf.)

Q. You were not excited, were you?

A. Well, I was thinking pretty seriously about the man's condition; more so than I was about outlining the facts.

Q. There were loose planks there?

A. Yes, sir, there were.

Mr. FALKNOR.—Yes. That is all.

Redirect Examination.

(By Mr. EMERY.)

Q. Had you noticed the tendency of the cars to pass that point at a higher rate of speed just shortly prior to this time?

Mr. FALKNOR.—Just a moment. I object to this as irrelevant, incompetent and immaterial.

The COURT.—The objection must be sustained.

Mr. EMERY.—I wish to show by this witness that complaint had been made that the motormen were running the cars by there at a high rate of speed and that it was necessary to put out flags to prevent them from doing that.

The COURT.—Yes, they might have done that, but this car might not have been running that way. They cannot be [143—111] held to the speed of that car, because of the speed of others because they might have reformed.

(Argument.)

The COURT.—He may testify as to the speed at which this car moved, but not others.

Q. I will ask you if complaint had been made by you to this Company with regard to the speed at which cars were run at this place?

(Testimony of —— Kumpf.)

Mr. FALKNOR.—Object to that as irrelevant, incompetent and immaterial.

The COURT.—Objection sustained.

Mr. EMERY.—Note our exception.

The COURT.—Exception noted.

Q. Did you see the motorman who was running on the car at that time on that day; I mean did you see him after the accident? A. I did.

Q. Did you talk with him? A. No, sir.

Q. Was that the same motorman you had referred to as talking to before? A. I don't know.

Mr. EMERY.—Do I clearly understand that I am precluded from showing that complaint had been made to this Company about running these cars too fast by this point, and that this witness had given them notice that their cars were running at a dangerous rate of speed.

Mr. FALKNOR.—They haven't pleaded anything of that kind.

(Argument.)

The COURT.—This witness testified to the rate of speed at [144—112] which the car was moving, but I think it would be error—I am satisfied it would be error to allow the other.

Mr. EMERY.—I don't want to have any error in the record. If you are satisfied. I thought I was right about it. I guess that is all with this witness.

Mr. FALKNOR.—Well, that is all.

(Witness excused.) [145—113]

[Testimony of Mike Hanson, for Plaintiff.]

MIKE HANSON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. EMERY.)

Q. What is your name? A. Mike Hanson.

Q. Mr. Hanson, did you see this accident at the time it happened? A. No.

Q. When did you first see Mr. Schlieff at that time?

A. This time the car was stopped, Mr. Schlieff was laying right beside the car; right beside the front wheel.

Q. Did you take notice of where the front end of the car was when Mr Schlieff fell off?

A. Between 60 and 80 feet away from the hole.

Q. Between 60 and 80 feet away from the hole?

A. Yes, sir.

Q. That is which direction; to the north of the hole; suppose this is to the north? A. Yes, sir.

Q. 60 to 80 feet north of this hole?

A. Yes, sir, down here (indicating.) [146—114]

Q. Did Mr. Schlieff fall off of the fender before the car stopped?

A. I don't know. I did not see anything of that.

Q You helped pick him up, I believe?

A. Yes, sir.

Q. Was he bleeding?

A. I don't know; I can't remember that.

Q. Was he conscious? A. Yes.

(Testimony of Mike Hanson.)

Q. Did he know what was being done; did he have his senses about him; understand what was being done? A. No.

Q. What did you do with him?

A. The inspector and me carried him into the hardware store.

Q. That is the building right in front of where this accident happened?

A. Yes, sir, right on the corner there.

Q. That is the building shown to the left in this picture? A. Yes, sir.

Q. What were you doing at that time?

A. Mixing mud.

Q. Where were you stationed; where was your mortar-box? A. Right there (indicating).

Q. How far were you from the hole?

A. 15 or 20 feet away from the hole.

Q. Toward the north? A. Yes, sir.

Q. Did you hear any bell rung on that car before it struck Mr. Schlieff? [147—115] A. No, sir.

Q. Did you hear any gong or other whistle or noise of alarm? A. No.

Mr. EMERY.—That is all.

Cross-examination.

(By Mr. FALKNOR.)

Q. Did you hear any bell?

A. I didn't hear any bell before the car was stopped.

Q. Did you hear the bell?

A. No, not before the car was stopped.

Q. Did you hear the bell? A. Yes.

(Testimony of Mike Hanson.)

Q. You did hear a bell? A. Yes.

Q. Well, they didn't ring the bell after the car was stopped?

A. The bell was still ringing at this time the car stopped.

Q. The bell was still ringing after the car stopped?

A. Yes, sir.

Q. You heard the bell before the car stopped?

[148—116]

A. No.

Q. It was still ringing when it stopped?

A. Yes, sir. At this time when the car stopped.

Q. Still ringing? A. Yes.

Mr. FALKNOR.—That is all.

(Witness excused.) [149—117]

[Testimony of ——— Krogh, for Plaintiff.]

——— KROGH, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. EMERY.)

Q. You are one of the firm of Krogh & Jessen, contractors? A. Yes, sir.

Q. Were you the people that worked under a contract with the city? A. Yes, sir.

Q. Mr. Schlieff was in your employ at that time?

A. Yes, sir.

Q. On your pay-roll? A. Yes, sir.

Q. Did you see the accident? A. Yes.

Q. Did you see him at the time the car struck him?

A. Yes.

(Testimony of ——— Krogh.)

Q. You know just where he was when he was struck? A. Yes.

Q. Where was he?

A. He was in the middle of the track straight in front of the car. [150—118]

Q. Whereabouts? A. Where is north?

Q. This is north (indicating) and this is south; (indicating) this is Cowan Park?

A. Well, he was right about there (indicating) about in the middle of the track between the two rails.

Q. What had he been doing just prior to that; as the car was approaching, what was he doing?

A. Why, he was here hauling some brick and mortar to hand down to the brick mason.

Q. Had he dumped the brick?

A. He had dumped the brick.

Q. Had he let go of the wheelbarrow?

A. Yes.

Q. Had he been to the hole already?

A. Yes.

Q. Had he passed any brick down after he emptied that load? A. Yes.

Q. Did he still have brick within reach to pass down?

A. The brick was laying right outside of the hole there. There was a plank laying across the edge of the hole for the men to step on so he could hand down the brick and mortar and he had to step off of that plank to take the brick and he was in the act—he had the brick in his hands and was going to turn around and hand them down in the hole as near as I

(Testimony of ——— Krogh.)

could see, and he lifted his right foot up there to step on that plank there and somehow or other he made a misstep and involuntarily he stepped out on the track; stepped right over in front of the track—I was standing on the sidewalk right [151—119] there and as he stepped over there I glanced down the track and there was the car within probably 12 feet.

Q. Was the car ringing any bell at that time?

A. I don't know.

Q. Did you hear any?

A. It did not come into my consciousness. I could not say whether I heard it or not.

Q. If it had been ringing you would have heard it?

A. I don't know. I think so. I saw Mr. Schlieff there.

Q. The car was within 12 feet of him at that time?

A. Yes, sir.

Q. Do you mean by that the body of the car or the fender? A. The front end of the car.

Q. And the fender projects three or four feet in front of the car? A. Yes, sir.

Q. That must have been within four to six feet of him? A. Yes, sir.

Q. It was impossible for him to get out of the way?

Mr. FALKNOR.—I object to that as suggestive and leading.

The COURT.—Yes.

Q. In your judgment and experience, would it have been possible for him to get off and to have gotten out of the way after you saw him in that position?

(Testimony of ——— Krogh.)

Mr. FALKNOR.—I object to that as a conclusion.

The COURT.—That is a matter for the jury to determine after giving the conditions.

Mr. EMERY.—All right. I will withdraw the question.

Q. What was Mr. Schlieff doing there? [152—120]

A. I don't think he saw the car because he turned half way around like he was going to come back. He wanted to come back over to the side where he was working.

Q. Was he facing south or north?

A. Well, he was kind of facing half way west and half way north; just like he was in the act of turning to come back to the place where he was working.

Q. If Mr. Schlieff had stood still at the point where he stood to pass brick down, do you think he would have been hit by the car in passing?

A. No, the car would pass him.

Q. Could barely pass him? A. Yes, sir.

Q. But in case of any slip or misstep he would go right in front of the car?

Mr. FALKNOR.—I object to that as conclusion.

Mr. EMERY.—Perhaps that is argumentative.

Q. How near would he have been to the car if he had stood still?

Mr. FALKNOR.—Now, he cannot anticipate the accident.

Mr. EMERY.—Except the motorman on that car did not see him—

The COURT.—He may state the distance from

(Testimony of ——— Krogh.)

where he stood on the track.

A. Why the car track was paved; there was concrete paving on the track outside of the rail there just about 18 inches outside of the rail and Mr. Schlieff, he was standing outside of that 18 inches.

Q. He stepped back onto it?

A. Yes, sir. In other words he was 18 inches away from the [153—121] east rail.

Q. The overhang of the car would be considerable, wouldn't it?

A. I don't know the width of the car.

Q. You don't know the width of the car?

A. No, sir.

Q. How wide is the track between the rails?

A. I can't tell.

Mr. FALKNOR.—The overhang is 18 inches; 16 or 18 inches I think. I don't know for sure. It don't overreach that concrete pavement.

The COURT.—I didn't understand the witness a while ago, but was the brick handed to this man on the same side of the track? A. Yes.

Mr. FALKNOR.—Yes, there was no occasion for him to cross the track at all.

Mr. EMERY.—There was no occasion for him to cross the track for material at all?

The COURT.—Yes, I understand the witness.

Q. The edge of this manhole to this excavation, did or didn't it extend back under the 18 inches of the concrete?

A. That extended back under the concrete.

Q. That extended back under the concrete and

(Testimony of ——— Krogh.)

under the ties? A. Well, under the concrete.

Q. Well, the ties were bedded in the concrete, weren't they? A. Yes, I guess they are.

Q. How far do you think he would be standing from the rail [154—122] in his ordinary position?

Mr. FALKNOR.—Well, the records show that standing at the center would be four feet and some inches.

The COURT.—He may answer.

A. Why, in the most natural position for him to work there he will be standing opposite the center of the hole.

Q. You mean exactly north of the center?

A. Well, on the north side—the side he was working on. The most easy way to work.

Mr. EMERY.—That is all.

Mr. FALKNOR.—I have no cross-examination.

(Witness excused.) [155—123]

**[Testimony of Charles J. Schlieff, in His Own
Behalf (Recalled).]**

CHARLES J. SCHLIEF, the plaintiff, being recalled, as a witness in his own behalf, having already been duly sworn, testified as follows:

Direct Examination.

(By Mr. EMERY.)

Q. I will ask you, Mr. Schlieff, now, whether or not to your knowledge you stepped upon any loose board that gave and caused you to make a misstep and spring onto the tracks.

Mr. FALKNOR.—That is objected to. I asked

(Testimony of Charles J. Schlieff.)

that time and time before.

The COURT.—The witness testified this morning.

Mr. EMERY.—Unless there is something that has come to his attention since.

A. No, sir, I don't know.

The COURT.—He has testified to that this morning.

Mr. FALKNOR.—I asked him that this morning.

Q. (Question read.) A. No, sir, I did not.

Mr. FALKNOR.—You don't know whether you did or not. A. No.

Q. (By Mr. EMERY.) If you did, it was involuntary, was it?

Mr. FALKNOR.—I object to that. [156—124]

The COURT.—Objection sustained.

Mr. EMERY.—I think that is our case, with this exception, I stated to counsel and he kindly consented to admit the American Mortality Tables of this man's expectancy. He was 42 years of age when this accident happened and I think his expectancy is 27 years.

Mr. FALKNOR.—Whatever you say.

Mr. EMERY.—I think it will be admitted that the expectancy according to the American tables of mortality is 27 years. That is all.

(Witness excused.)

Plaintiff rests.

Mr. FALKNOR.—What is the practice in regard to the argument of motions? Are they in the presence of the jury or not?

The COURT.—Why it is usual, I think, to make them in the absence of the jury.

(Jury is excused from the courtroom).

Mr. FALKNOR.—The defendant at this time moves your Honor for a judgment of nonsuit for the reason that the plaintiff has wholly failed to establish any cause of action against the defendant; second, for the reason that the plaintiff's evidence shows that he was guilty of contributory negligence which was the proximate and sole cause of the accident; three, for the reason that the plaintiff was engaged at the time in the performance of work within the scope covered by the Workmen's Compensation Act and at the plant of the [157—125] employer, within the terms and limitations of said Act. (Argument.)

(Adjournment until ten o'clock A. M., January 9th.) [158—126]

[Proceedings Had January 9, 1914, 10 A. M.]

January 9th, 1914, Ten A. M. Session.

(Argument on motion continued.)

The COURT.—Now, I am frank to say to both of you gentlemen that I have great doubts about the legal status of the case and of course the proper course is to search out and follow as nearly as may be the true intent of the legislature and accept that sense of the Act—the words which are used which harmonize best with the context and promotes with the fullest measure the apparent policy and object of the legislature. Now, when we consider this Act, the primary purpose or course is to provide for the

injured workmen. And second for the industries of the State. The Act says,—quoting from the section which I read a moment ago—“The welfare of the State depends upon its Industries, and even more upon the welfare of its wage-worker.” So I think that it can clearly be said that in the enactment of this measure, the legislature had in mind, first the workmen and next the industries. This Act mediates between the employer and employees’ provision for compensation for injury and disability, irrespective of fault or negligence, and as stated a moment ago, the Act abolishes the statutory right of the party and of the wife or children to sue for the death of the husband and father, and it likewise takes away the common-law remedy which is afforded to the injured workman to sue his employer for negligence for any injury which may have been occasioned to him. The further construction of this statute [159—127] and the expressions used is where the question of doubt arises in this case. Taking the use of the word “plant” under the exception, and then taking the definition as given under the Act under section three of this Act, an institution such as disclosed by the testimony in this case as the employer of the plaintiff, does not seem to be given any position. I am going to deny this motion. This is a matter that can be disposed of at a more mature deliberation and consideration and can all be disposed of upon one appeal and the whole matter might as well be submitted in the final disposition of it rather than to dispose of it in a motion for nonsuit. The Court will hear the entire case and then make

final disposition. The motion is denied. Bring in the jury.

Mr. FALKNOR.—The Court allows me an exception?

The COURT.—Oh, yes; exception allowed.

(Jury returned into court.)

(Opening statement made to the jury by counsel for the defendant.) [160—128]

[Testimony of Dr. H. B. Thompson, for Defendant.]

Doctor H. B. THOMPSON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FALKNOR.)

Q. Doctor Thompson, you are a practicing physician? A. Yes, sir.

Mr. FALKNOR.—Do you admit his qualifications?

Mr. EMERY.—I would like to know how long he has practiced.

Q. How long have you been practicing?

A. Seven years.

Q. Where? A. Eight years.

Q. Where have you practiced seven years?

A. Why, I first was in the Northern Pacific Hospital in Tacoma for a year. I practiced up at Elby in Washington for nearly a year and since that time I have been in Seattle.

Q. You were formerly one of the physicians of the company? A. Yes, sir.

Q. When did you sever your relations with the company? A. The 4th of last November.

(Testimony of Dr. H. B. Thompson.)

Q. You are not now in the employ of the company?
[161—129] A. No, sir.

Q. Now, while you were in the employ of the company as one of its physicians did you see the plaintiff in this case? A. I did.

Q. Do you remember where it was you saw him?

A. I saw him first at the store out on 14th Avenue northeast, in the University district, and then I accompanied him with Doctor McKinney into the Seattle General Hospital.

Q. Now, did you take any X-rays to determine the extent and character of his injuries?

A. Yes, sir.

Q. Now, what injuries did you find that he had sustained in that accident?

A. There was a bump on the left side of his forehead where the skin was cut a little and there was some swelling, and his left ankle was considerable swollen and discolored. He complained of pain in the right side of his chest, but there were no marks of injury there.

Q. How did you endeavor to determine with Doctor McKinney, whether there was any fracture of any of the ribs?

A. We both examined him there and aside from general tenderness of which he complained, there was no evidence of a fractured rib. That is, there was no crookedness and we could not push the ends of a *broken together* so that they would creak or make a noise, or so that you could feel it. There was no deformity, and there was no definite point of

(Testimony of Dr. H. B. Thompson.)

tenderness as there usually is when a rib is broken.

[162—130]

Q. You could not find any evidence of a broken rib then? A. No, sir.

Q. Now, did you take an X-ray of his left ankle?

A. Yes, sir.

Q. I will ask you to look at that and state whether that is an X-ray you took of his left ankle.

A. Yes, there are two pictures on this one plate.

Q. That shows the condition of the fracture does it? A. Yes, sir.

Mr. FALKNOR.—I would like that this be marked Defendant's Exhibit 8, and then I will ask you to show it to the jury.

The COURT.—It may be marked.

(X-ray plate in question received in evidence and marked Defendant's Exhibit 8.)

Q. Now, Doctor Thompson, if you will stand down before the jury and explain to them which bone was injured and which bone was not injured?

A. It is pretty hard to get this so that they can see it. This plate was taken so that the two pictures was taken on the same plate. The first picture on the plate—the plate was covered with a piece of paper so that it was not exposed and then the lens was shoved over a little further and this picture was taken. I have written on one side of this "front view," that is a view taken directly from the front to the back. On the other side is a side view, from the outer side, taking the picture through from side to side. In the front view, there is the large bone

(Testimony of Dr. H. B. Thompson.)

and the small bone; they appear to be [163—131] side by side (indicating). In the side view the small bone is to the outer side and in the back of the large bone at the bottom where the large bone is large enough to cover over the small bone. Now, you can see plainly the break in the small bone, extending from about this point (indicating) to two inches above the lower end of the small bone, extending diagonally down and forward across the small bone. Now, this crack, you can see through the large bone. It might create a wrong impression. You apparently see a crack in the larger bone, but it is really a continuation of the crack in the small bone, and the large bone simply overshadows it in the side view. In the front view I can make out that there is a crack across there, but a person not used to looking at an X-ray would not be able to tell from the front view alone that there was any break in the small bone.

Q. Now, explain which is the large bone.

A. The large bone is the one to the left.

Q. That was not in any wise affected?

A. No, sir.

Q. But the fracture was in the small bone extending—take this one to the left—extending from what point to what point? Mark it.

A. Extending from here (indicating) down to there (indicating), but it lies in this plane; the plane that is in the same plane as my hand, so that you can see the crack; also the fragment is in that position, and also the upper fragment, and the crack comes across this way, so that the crack is apparent in the

(Testimony of Dr. H. B. Thompson.)

side view and not in [164—132] the front (indicating). That picture was taken immediately upon his admission to the hospital and before anything was done.

Q. Now after the picture was taken was the fracture reduced and the bones put in their natural position?

A. They are practically in their natural position there; no change was made in the position of the bones because they are in position there; simply putting them up in a plaster cast.

Q. Was there any injury to his left foot?

A. Not below the ankle; there was an injury to the ankle.

Q. Not below the line of this fracture?

A. Yes, there was some injury below the line of that fracture. There was an injury to the ankle joint which is below the line of fracture. There was no injury to the foot whatsoever.

Q. There was no injury to the foot itself?

A. No.

Q. Well, was there any injury to the bones in the arch of the foot? A. No, sir.

Q. About in what time, Doctor Thompson would you think, or about in what time, did the plaintiff make a recovery, do you think?

A. Why, probably in about ten weeks he could walk on the foot with quite a good deal of comfort. At the end of three months he ought to be fairly well. It might bother him some for a considerable time

(Testimony of Dr. H. B. Thompson.)

after that. In doing heavy work or being on his feet a long time.

Q. Doctor, in your judgment was there any permanent injury? [165—133]

A. No, I don't think there would be.

Q. Now, Doctor, did you last night take some X-rays with the view of determining whether or not there had been any injury to his left foot?

A. Yes, sir.

Q. Are these the X-rays as taken? A. Yes, sir.

Q. Those are the X-rays that were taken?

A. Yes, sir.

Q. One of the left foot and one of the right?

A. Yes, sir.

Mr. FALKNOR.—We ask that these be received and marked as Defendant's Exhibits 9 and 10.

The COURT.—Let the exhibits 7, 8, 9 and 10, all be admitted.

(X-ray plates in question received in evidence and marked Defendant's Exhibits 7, 8, 9 and 10 respectively.)

Q. Now, showing you Defendant's Exhibit 9, that is which foot? A. That is the left foot.

Q. The left foot? A. Yes, sir.

Q. Now, by a comparison of the X-rays of those two exhibits 9 and 10, what do they show? What does the present condition show?

A. Why, in comparing the two feet, they are as near alike as any two feet you could ever get on the same individual. There are no two feet exactly alike. The bones of a person are slightly different the same

(Testimony of Dr. H. B. Thompson.)
as the features of a [166—134] person, but the position of the bones and the entire X-ray are as near alike as two pictures of two different feet could possibly be.

Q. What would be your opinion, Doctor, as to whether the flatness of the left foot has any relation whatever to this accident?

A. I don't think it has.

Q. Why do you say that, Doctor?

A. In the first place the injury was of such a nature that it could not produce a flat foot. Unless there had been some outward displacement of the lower fragment—the lower piece of the broken bone,—if that had been displaced outward it would have turned the ankle outward and allowed him to walk on the inner side of his foot, but as long as that was perfectly straight as it is normally it could not produce a flat foot. From my examination of his feet yesterday and also last night, the feet are exactly the same. If there is any difference, the right foot is a little more flat than the left.

Q. The one that was not injured in the accident is a little more flat than the left one? A. Yes, sir.

Q. Now, did you make any demonstration with imprints?

A. Yes, sir, I did. I would like to explain these marks that I put on these plates before the jury.

Q. Yes.

A. In measuring the height of the arch we draw a line from the bottom of the heel bone across the bottom of the foot to the bottom of the bone at the base

(Testimony of Dr. H. B. Thompson.)

of the big toe. Then if you take a piece of paper with right-angle corners, [167—135] and lay it on this base line so as to get a perpendicular line, you can measure from here up to the top of any of those bones in the arch of the foot and in what we call the tarsal bone you will find that the perpendicular distance from this base line to any of these bones is exactly the same, as near as you could measure it on the two plates, on the left and the right. These marks were just put on the outside with pencil so that you can lay it down on the table and see it.

Q. Now, recurring to my former question, I will ask you what examination you made with imprints.

A. The bottom of his feet were inked and then he was asked to step first on one piece of paper with the left foot and then on another piece of paper with his right foot; just asked to step along, three steps, and in the middle step he stepped on one of these pieces of paper with first one foot and then the other.

Q. Now, have you got those imprints?

A. Yes, sir.

Mr. FALKNOR.—We ask that these exhibits be received in evidence and marked as Defendant's Exhibits 11 and 12. Do you want to see them first, Judge Emery?

Mr. EMERY.—I saw them taken. Better mark one of them "right" and the other one "left" so we will know which they are.

Mr. FALKNOR.—I think we could tell which one was the right and which was the left foot.

Mr. EMERY.—I think so, but it might be just as

(Testimony of Dr. H. B. Thompson.)

well to have them properly marked.

The COURT.—If there is no objection, let them be admitted. [168—136]

(Imprints in question received in evidence and marked as Defendant's Exhibits 11 and 12 respectively.)

Mr. EMERY.—Let the Doctor mark "right" and "left" on them, so that there will be no question.

Q. Yes. Just mark "R" on the one that is right and "L" on the left one.

(Witness marks as directed.)

Q. Now, Doctor Thompson, you may explain these imprints to the jury, using the exhibits.

A. Well, with the bottom of the foot inked, of course any portion of the foot which comes in contact with the paper will leave a mark. Now, in the foot with the high arch, the inner side of the arch will not come in contact with a flat object placed on the floor so that you could get an imprint of the heel and also the ball of the foot with an imprint along the outer side of the foot, leaving a large cavity which corresponds with the arch of the foot, and the higher the arch of the foot the greater will be this indentation (indicating), with the exception that some people with high arches will not give as small a mark or as great an indentation on account of the effect of the person's foot. But if you will compare two feet of the same individual, that has the same amount of fat on the two feet, you can get an idea as to which arch is higher with the same individual, and if you will compare this mark with the mark made by the

(Testimony of Dr. H. B. Thompson.)

foot of another individual it would not be very accurate on account of the different amount of fat that there is on each different individual, but with the same individual, it gives a [169—137] fairly accurate idea.

Q. Now what was the result of your test, Doctor?

A. Well, the left shows a much narrower mark through the arch than does the right foot. That shows that the right arch bends down under the weight of his body more than does the left.

Q. That is the foot that was not injured, bends down further than the foot which was injured, or the leg that was injured?

A. Yes, sir. They are very nearly alike. There is not a great deal of difference, but what difference there is is in favor of the right foot.

Mr. FALKNOR.—Will you admit that the city of Seattle remitted to the State for the benefit of the fund of the State Industrial Commission and the Workmen's Compensation Act, the assessment collected on the property on the improvements that the plaintiff was engaged at at the time; I have Mr. Kelly here from the city, but I thought if you would admit that, I could excuse him.

Mr. EMERY.—You mean to say that the State paid the assessment on the work on which it employed Krogh & Jessen?

Mr. FALKNOR.—And charged it up against Krogh & Jessen.

Mr. EMERY.—Yes, I will admit that if you say it is a fact.

(Testimony of Dr. H. B. Thompson.)

Mr. FALKNOR.—On this individual job.

Mr. EMERY.—Oh, yes, the city paid it for Krogh & Jessen.

Mr. FALKNOR.—On this individual job.

Mr. EMERY.—Yes, I will admit that if you say so.

Mr. FALKNOR.—Very well.

Q. Doctor Thompson, was there anything further that you wanted to state in regard to your examination last night [170—138] other than I have asked you? A. No, I don't think of anything.

Mr. FALKNOR.—That is all.

Cross-examination.

(By Mr. EMERY.)

Q. What school are you a graduate of?

A. Rush Medical College, Chicago.

Q. What is your age? A. 31.

Q. You must have graduated there at 23 or 24?

A. Yes, sir, something like that.

Q. Did you have any practice in the hospitals of Chicago?

A. I had charge of the X-ray Laboratory for the Presbyterian Hospital before I came out here.

Q. For how long were you engaged in that business?

A. I was in the X-ray Laboratory there for two years.

Q. Your business was making X-ray pictures?

A. Yes, sir.

Q. Did you have any general practice during that time in surgery? A. Not during that time, no.

(Testimony of Dr. H. B. Thompson.)

Q. So that then for two years of your seven since your [171—139] graduation you were engaged as an X-ray artist?

A. No, this two years was before my graduation; that is 18 months before and 6 months afterwards.

Q. What was the work you undertook after you graduated; surgical work?

A. I served as intern in the Northern Pacific Hospital at Tacoma.

Q. How long were you there?

A. I was there about a year, or nine months.

Q. Did you do any X-ray work there?

A. Yes, sir.

Q. Do any surgical work? A. Yes, sir.

Q. What surgical work?

A. Assistant to Doctor Allen, the Chief Surgeon there.

Q. You handled the bandages and instruments while he set the bones?

A. I wouldn't want to tell you what I did.

Q. Now that was 9 months; what was the next work that you did?

A. Practiced as a general practioner at Elby.

Q. How long were you there?

A. I was there eight or nine months.

Q. Did you have a large number of surgical cases there? A. No, sir. I had some.

Q. Nine and nine is 18; now that is a year and a half; now what did you do next?

A. I came to Seattle.

Q. Where did you locate here?

(Testimony of Dr. H. B. Thompson.)

A. In the Empire building with Doctor Willis.

[172—140]

Q. And had a general practice? A. Yes, sir.

Q. Were you engaged in either the hospitals at that time or soon thereafter?

A. Yes, I have had charge of the X-ray Laboratory in the Seattle General Hospital ever since it was installed.

Q. How long ago was that?

A. Oh, that was about 5 years ago.

Q. Have you had extensive general practice in the city or have you confined your work largely to X-ray work?

A. No, I have had general practice, acting as assistant to Doctor Willis beside my X-ray work.

Q. How long were you engaged by the Seattle Electric Company, the defendant, in their work; as an expert for them?

A. I acted as an assistant to Doctor Willis from the time I came to Seattle until about two months ago; about 6 years.

Q. You have testified as an expert for the company in a good many cases, haven't you?

A. Some cases.

Q. Well, a good many cases haven't you?

A. It depends on what you call a good many.

Q. How many cases have you testified in as an expert for the company, about?

A. Oh, it would be pretty hard to tell.

Q. 75 or 100 cases? A. No, not that many.

Q. 50 or 60 cases?

(Testimony of Dr. H. B. Thompson.)

A. Well, I would put it at about 50 probably in the six years. [173—141]

Q. Always on the part of the company and at the company's request? A. Why if my testimony—

Q. (Interrupting.) —always on the part of the company?

A. Why, if my testimony would not help them they would not call me.

Q. You have always been called and testified for the company? A. No, sir.

Q. You have been called by the other side and testified against the company? A. Yes, sir.

Q. In cases in which the company was interested?

A. I think I was in one case.

Q. Now, Doctor Thompson, your opinion is the arch of the foot or the bones of the arch, the tarsal and the metatarsal bones, those constitute the arch, don't they? A. Yes, sir.

Q. Your opinion is that these bones were not in any way injured? A. Yes, sir.

Q. In this man's foot? A. Yes, sir.

Q. You base that opinion upon these X-ray pictures?

A. I base that on these X-ray pictures and also on my first examination.

Q. Did you examine the foot at that time?

A. I certainly did.

Q. What did you do toward that examination?

A. I examined it with Doctor McKinney and I helped him fix [174—142] it up and put it in a plaster cast.

(Testimony of Dr. H. B. Thompson.)

Q. You put the plaster cast on the foot, did you?

A. Put it on the entire leg from the knee down to the base of the toes.

Q. What did you enclose the foot in that plaster cast for if it was not hurt?

A. It is customary in a fractured ankle—

Q. Then the ankle was fractured?

A. Well, we call it a Pott's fracture of the ankle when the small bone—

Q. What constitutes the ankle?

A. There is three bones go to make up the ankle joint.

Q. That is the astragalus, that is one?

A. That is one; the tibia and the fibula is the other. The fibula does not really go to make up a part of the ankle.

Q. Doesn't the external malleolus pass down over that and constitute the ankle joint and isn't the external end of the tibia and the fibula respectively?

A. Yes, but the fibula itself is not connected directly with the joint cavity.

Q. But the bone protects the joint cavity?

A. Yes, sir.

Q. If I was to call it, I would call it my ankle bone—this thing? A. Yes, sir.

Q. That is the end of the fibula? A. Yes, sir.

Q. The tibia is the inner bone? A. Yes, sir.

Q. And the fibula is the outer bone? [175—143]

A. Yes, sir.

Q. The tibia is the larger and the fibula the small bone? A. Yes, sir.

(Testimony of Dr. H. B. Thompson.)

Q. Was there any trouble with the ankle joint other than the point of the fibula that you say was broken? A. Yes, sir.

Q. What was the trouble?

A. The ankle joint itself was badly sprained.

Q. What does the sprain involve about the bones; anything?

A. Why it involves the tearing and stretching of the ligaments attached to the bones.

Mr. EMERY.—That is all, Doctor. No further questions.

Redirect Examination.

(By Mr. FALKNOR.)

Q. That had no connection with these bones down in the arch of the foot? A. No, sir.

Mr. EMERY.—Just a minute; I will ask one further question. [176—144]

Cross-examination (Resumed).

(By Mr. EMERY.)

Q. You think that this man is not limping at this time at all?

A. Why, I don't know about that. I wouldn't want to say whether he is or is not. I have his word for it.

Q. Might it be possible that he is telling the truth about having pain in this part of his foot?

A. Certainly.

Q. It might be possible that he is telling the truth about that? A. Certainly.

Q. That would constitute an injury to the arch of his foot? A. No, sir.

(Testimony of Dr. H. B. Thompson.)

Q. Indicate an injury to the arch?

A. No, sir.

Q. The tendons compose a part of the arch?

A. No, sir.

Q. What would cause pain down there if he did not have any injury; his imagination?

A. No, sir.

Q. Oh, that is all. If you can't tell, that is all right. [177—145]

Redirect Examination.

(By Mr. FALKNOR.)

Q. Doctor Thompson, in your manipulation and examination, did you find any evidence of anything that would cause pain there?

A. I could not find any evidence of anything, no.

*Q. *tion or examination, there is no
eing wrong there that would cause*

A. No, as far as you could find out from examination. Still the man might have pain.

Q. (By Mr. EMERY.) You are willing to state that it might be possible that some of these tendons in the bottom of his foot were strained and hurt?

A. I don't think so; not at the time of this accident.

Q. (By Mr. EMERY.) Do you think it might have been done since?

A. The pain might have come on since then. I think the pain is probably due to a slight amount of flat foot which he has.

*Omitted portions of question do not appear in original certified typewritten record because of defective carbon copy.

(Testimony of Dr. H. B. Thompson.)

Q. (By Mr. FALKNOR.) Does a flat foot, irrespective of an injury, tend to induce pain?

A. Yes, sir.

Q. Then if he has any pain there it would be probably the natural pain resulting from a natural flat foot? A. Yes, sir.

Mr. FALKNOR.—That is all.

(Witness excused.) [178—146]

[Testimony of Dr. Bruce Elmore, for Defendant.]

Doctor BRUCE ELMORE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FALKNOR.)

Q. You are a physician?

Mr. EMERY.—We will admit Doctor Elmore's qualifications without any question.

Q. What experience have you had relative to the examination of flat feet?

A. The experience of examining men for the United States Navy.

Q. Covering what time?

A. Off and on for about eight years.

Q. In that time you have probably had occasion to examine how many flat feet?

A. Oh, it is in the thousands; it is somewhere in the thousands because we run—when I was stationed in Washington, I would have a whole train-load of them; several hundred of them as fast as we could.

(Testimony of Dr. Bruce Elmore.)

Q. About what per cent of people are afflicted with flat feet?

A. Of the candidates for the navy that we examine, approximately [179—147] we turn down 12 per cent of the applicants, for flat feet.

Q. You examined the plaintiff last night did you?

A. Yes, sir.

Q. What did you find with reference to his feet?

A. Why, I can explain that best with my little ruler which is a method—

Q. Just do it please.

A. This little rule which I have devised and published and is being established now in the navy, in the detection of flat feet. You can see how the skeleton forms the arch and therefore the flesh doesn't make any difference. This external malleolus, I have devised this little rule—first I have a man stand on his toes to see how much give there is and I record whether they are lax or rigid; that is, whether the ligaments are held up pretty well, and then with this measure I measure and record in eighths of an inch; I see what relation this bears to this line (indicating). I found on examination of this man—I think it is his right foot is one-fourth below and his left a third.

Q. Which is flatter?

A. His right. They are very close. That is only one-eighth of an inch, you understand.

Q. The right foot a little flatter than the left?

A. I made it four-eighths below.

Q. What would you say about the flatness of his

(Testimony of Dr. Bruce Elmore.)

left foot, if any, with relation to any accident?

A. Why, I don't think there is; I don't think it has any relation to an accident. I don't think his foot is flat. [180—148]

Q. Explain what you mean.

Mr. EMERY.—Oh, that is not a proper question.

The COURT.—I think he may answer.

A. What I mean is this: If I just examine that man's foot, say he came and applied for enlistment, and he did not say anything about having any pain or anything else, I think I would admit him to the navy for this reason, that it has been established on some records I have kept, and I admit all up to four-eighths and a half an inch below, because on those recorded cases which I have been working on for about three years, I find that after they get into the service they do not have trouble with their feet. Those above,—but about four-eighths or a half an inch below is the danger line.

Q. Yes. It isn't so flat but what you would admit him to the navy?

A. No, I would on the measurements alone.

Q. But his feet are flatter than some of the rest of us? A. Oh, yes. They vary a good deal.

Q. But do you think his feet are in their natural condition; that is, whatever flatness he has comes from natural conditions?

A. I should say they are about the same as they always have been, probably, as far as the arch goes.

Mr. FALKNOR.—That is all. [181—149]

(Testimony of Dr. Bruce Elmore.)

Cross-examination.

(By Mr. EMERY.)

Q. Did you ask this man about any injury having happened to the foot?

A. Yes, I asked the usual questions.

Q. You haven't any reason to doubt the truth of Doctor Thompson's statement that he found on January 23d a break on the point of the fibula?

A. No, I have no reason to doubt that.

Q. That is, he found the injury; a spraining of the ankle joint, which is generally between the astragalus, the calcis and one of the cuneiform bones and the scaphoid on the other?

A. No, that is not. It is the connection between the astragalus and the tibia on the one hand, and the external malleolus coming down on the outside.

Q. Now, he says that the bones of the ankle,—the tendons and cords of the ankle had been sprained. Doctor Thompson says that. Doctor McKinney testified that there was some injury to the foot which he could not determine the extent of, but the foot was swollen. Both the doctors testified that they put that foot in a plaster cast clear down to the base of the toe and stayed there for the proper length of time, and the man has testified and it isn't so far beyond question that he suffered pain in this part of his foot ever since, and Doctor McKinney testified that, knowing that fact, [182—150] and finding it to be true, he put a pad under his foot, and he has been wearing it there for six months, which pad is a half an inch high? A. Yes, sir.

(Testimony of Dr. Bruce Elmore.)

Q. Now, would that fact have any bearing in your mind towards showing that an injury had occurred to the arch of the foot or the tendons and cords composing the arch?

A. I could believe that the man had pain, but beyond absolute physical finding—

Q. Now doctor.

Mr. FALKNOR.—Just a moment. Let the witness answer.

The COURT.—If you have not finished your answer you may do so.

Mr. EMERY.—Yes, he may answer the question.

A. All I want to say is that from actual physical findings I can determine no evidence of injury.

Q. But from the history of the case, if that is true, there was some injury there?

A. If that were true.

Q. As long as the pain continued there is some evidence that there was some injury there?

A. Not necessarily due to injury; I don't know what the pain is due to.

Q. Do you think that pain will follow?

A. Yes, sir.

Q. What would cause pain in the tendons and cords of a man's foot?

A. You can have pain from neuritis or rheumatism—

Q. If you found pain that you know comes from an injury of the foot and that same pain continues right along for [183—151] months, even to the present moment, wouldn't that indicate to you, if

(Testimony of Dr. Bruce Elmore.)

you believed that to be true, that the man had an injury to his foot?

A. It would indicate that he may have.

Q. Why certainly. Now, if you knew that fact you would probably be influenced some in your judgment about taking him into the navy, wouldn't you?

A. If he complained of pain and said he couldn't walk, I would not admit him to the navy.

Q. Of course not. You haven't anything to indicate to you anything different but what this man's testimony is truthful, have you?

A. As far as I know at present.

Q. And but what Doctor McKinney's testimony is truthful?

A. Certainly; I have no knowledge of that at all.

Redirect Examination.

(By Mr. FALKNOR.)

Q. What did he tell you about any injury to the foot when you asked him if the foot had been injured?

A. I asked him, as I always do candidates—I went at him just the same as if he were applying for the navy, and I asked him if he had had any accident, and he said, “None, [184—152] except I broke my leg a certain length of time ago”—I said, “How long have you been able to go to work?”

Mr. EMERY.—Now, just wait a moment. I heard that testimony.

A. Yes, you were present there.

(By Mr. EMERY.)

Q. He told you to the foot too, didn't he?

(Testimony of Dr. Bruce Elmore.)

A. He said, the leg and the foot.

Q. Yes.

A. I said, "How did you do it?" Well, he said he was hit by a car and that he was laid up and I asked him when he was able to go to work and he told me in months. I don't remember what time. I asked him if it hurt now and he says, "Yes, it sometimes does. It does hurt now." Then I examined his foot and the history of the case says that he has pain. That may be true. It is undoubtedly true.

Q. (By Mr. FALKNOR.) Could you find any evidence of anything that would cause pain?

A. I could not find any physical evidence of anything that would cause pain.

Q. It is easy to say a person has pain and there is no way to disprove it, is there? A. No, sir.

Mr. FALKNOR.—That is all.

Q. (By Mr. EMERY.) You would not have any occasion to believe this man has been shamming all this time, would you? A. No, sir, none whatever.

Q. (By Mr. EMERY.) Or that Doctor McKinney had been shamming about it? [185—153]

A. None whatever.

Mr. EMERY.—No, of course not. That is all.

(Witness excused.) [186—154]

[Testimony of Dr. H. B. Thompson, for Defendant
(Recalled).]

Doctor H. B. THOMPSON, being recalled as a witness on behalf of the defendant, having already been duly sworn, testified as follows:

(Testimony of Dr. H. B. Thompson.)

Direct Examination.

(By Mr. FALKNOR.)

Q. Mr. Thompson, something has been said about the foot being put in a cast with the rest of the leg. Explain why that was done.

A. Why, the first rule in surgery is to immobilize the joints both above and below that injury; so that if you have a break of the knee you immobilize not only the knee but you immobilize the hip and the ankle; if you have a fracture of the ankle, the common rule is to enclose the entire foot and also the knee in the cast. This man's knee was not enclosed in the cast because there was so little displacement of the bone, but the cast extended up to the knee.

Q. You did not immobilize the foot because of any jury to the bone in the foot? A. No, sir.

Q. But because of the rule of surgery in reference to the fractured bone? A. Yes, sir. [187—155]

Mr. FALKNOR.—That is all.

Mr. EMERY.—That is all. I would like to recall Doctor Elmore.

(Witness excused.) [188—156]

**[Testimony of Dr. Bruce Elmore, for Defendant
(Recalled—Cross-examination).]**

Doctor BRUCE ELMORE, being recalled as a witness on behalf of the defendant, having been already duly sworn, testified as follows on

Cross-examination.

(By Mr. EMERY.)

Q. Doctor Elmore, isn't it true that a severe injury to the joint and particularly to the ankle joint may

(Testimony of Dr. Bruce Elmore.)

cause—and this knee joint, may cause prolonged and continuing injury to that joint without there being any outward physical manifestations of it?

A. That is true.

Q. That is true? A. Yes, sir.

Mr. EMERY.—Well, that is all.

Redirect Examination.

(By Mr. FALKNOR.)

Q. If it is any very extensive pain it will affect the pulse rate? [189—157]

A. It might or might not. There would not be anything very definite about that.

Mr. FALKNOR.—That is all.

(Witness excused.) [190—158]

[Testimony of R. B. Nelson, for Defendant.]

R. B. NELSON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FALKNOR.)

Q. You were the motorman, were you?

A. Yes, sir.

Q. How long had you been in the employ of the company? A. Since the 15th of November.

Q. When did you cease to be in the employ of the company?

A. The 26th of this last December, 1913.

Q. Had you ever had any experience as a motorman previous to that time? A. Yes, sir.

Q. Where? A. Eugene, Oregon.

(Testimony of R. B. Nelson.)

Q. Now, Mr. Nelson, you were there in charge of the car. Tell the jury how this accident happened.

A. Well, I was going down 14th Avenue Northeast and I was going about—I was going about 6 or 7 miles an hour and I rang my gong about 20 or 30 feet from where these workmen were working and as I got about 5 feet from this manhole, this man stepped on a loose plank and [191—159] fell or maybe jumped, like he was trying to get out of the way and fell right on the middle of the track.

Q. If he had remained where he was, would your car have gone past without hitting him?

A. Yes, sir.

Q. He was within 5 or 6 feet of you when he jumped in front of the car? A. Yes, sir.

Q. Did you do all you could then to stop the car?

A. Yes, sir.

Q. About how far did your car go after you hit him? A. About 20 feet.

Cross-examination.

(By Mr. EMERY.)

Q. What was the size of this car?

A. Well, I don't know just the length of those cars.

Q. Can you give approximately the length of it?

A. About 35 feet, if I could judge.

Q. Do you mean 35 feet over all?

A. No, just the car.

Q. Not including the entrance point?

A. From the head end of the car to the rear end of the car. [192—160]

Q. How much does the fender project in front of

(Testimony of R. B. Nelson.)

that? A. I should judge just about three feet.

Q. How far?

A. I should judge about three feet.

Q. Where was he when you first saw him?

A. He was bending over at the north of the manhole.

Q. Looking down in the manhole?

A. I couldn't say as to that.

Q. Did he have anything in his hand?

A. I couldn't say as to that.

Q. Who else was there at that time near him?

A. Nobody that I saw.

Q. Nobody that you saw; did you see a man working in the manhole? A. Yes, sir.

Q. Did you see Mr. Kumpf standing three feet or four feet from him to the side?

A. I don't know that I did.

Q. You didn't notice him, but you did notice how far Mr. Schlieff was from the track? A. Yes, sir.

Q. You looked for that, I suppose, to see if your car would clear? A. Yes, sir.

Q. You had the usual appliances on this car for stopping it, didn't you? A. Yes, sir.

Q. They were all in good condition?

A. Yes, sir.

Q. Had an air-brake? [193—161]

A. Yes, sir.

Q. What is that; Westinghouse pattern?

A. The National.

Q. That is a three-way valve?

A. No, I think not.

(Testimony of R. B. Nelson.)

Q. Only a two-way valve; how do you discharge your air? A. It was a single release.

Q. What pressure were you carrying on the air-brake? A. About 70 pounds.

Q. Do you know whether you had 70 pounds on that car at that time or not? A. Yes, sir.

Q. Where did you start to slow down the car?

A. Well, I was slowing down all the time; I was just drifting down the hill.

Q. You rang the bell about 30 feet before you got there? A. Between 20 and 30 feet.

Q. How far were you from that place before you saw that man first?

A. Well, I saw the man—I was up there to the top of the hill when I first saw him.

Q. Two or three blocks? A. Yes, sir.

Q. Six or eight hundred feet? A. Yes, sir.

Q. How many men were there?

A. Five or six, I guess.

Q. Plain view all the time? A. Yes, sir.

Q. Had complaint been made to you by any of the men on that [194—162] work there about running by there too fast? A. No, sir.

Mr. FALKNOR.—Just a moment. That is not competent.

Q. What gong—what kind of a gong have you on that car? A. Called a rotary gong.

Q. One that when you touch it it will ring for some time? A. Yes, sir.

Q. And ring pretty loud? A. Yes, sir.

Q. Makes a pretty loud noise? A. Yes, sir.

(Testimony of R. B. Nelson.)

Q. Under ordinary conditions, that gong would be heard about two or three blocks?

A. About two blocks, I should judge.

Q. You think under the conditions that prevailed there that gong could have been heard there two blocks easily? A. Yes, sir.

Q. Nothing making any unusual noise?

A. No, sir, only the car.

Q. No concrete mixer or anything of that sort going there? A. Nothing but the car.

Mr. EMERY.—That is all.

(Witness excused.) [195—163]

[Testimony of R. E. Ward, for Defendant.]

R. E. WARD, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FALKNOR.)

Q. You were the conductor on the car?

A. I was, yes, sir.

Q. When did you first see the man?

A. When they were picking him up right beside the car.

Q. You didn't see him before? A. No.

Q. How long have you been conductor with the company?

A. I have been here since the 7th of September, 1912.

Q. You are in the employ of the company now as one of its conductors? A. Yes, sir.

Q. About what speed do you think your car was

(Testimony of R. E. Ward.)

going down there at the time just previous to the accident?

A. Well, I should say we wasn't going a bit more than 7 miles an hour; between 6 and 7. I don't think it was a bit more than seven.

Q. What attracted your attention to this accident?

A. Well, the car came to a sudden stop that way. I heard [196—164] something strike against the front end of the car and then the car came to a sudden stop.

Q. Had you heard the bell; did you observe the bell; had your motorman sounded any bell as he came down there?

A. Well, we was drifting down there at a very slow speed; about 7 miles an hour, and I was just fixing up the trip sheet.

Mr. FALKNOR.—That is all.

Cross-examination.

(By Mr. EMERY.)

Q. Was the car stopped with the emergency brake? A. Yes, sir.

Q. A very sudden stop?

A. Very sudden for I picked myself up about halfway up in the car.

Q. It threw you halfway up in the car?

A. Threw me way up to the cross-seats.

Q. Did you have very many passengers on there at that time? A. There was one or two.

Q. Do you know who they were? A. No, sir.

Q. Did you take their statements of what they saw of what [197—165] happened there?

(Testimony of R. E. Ward.)

A. Well, I don't remember whether I took those or not, because I went as soon as I saw the accident, I went across the street there to telephone.

Q. Did you take the statements of the people around there who saw the accident?

A. The motorman took them while I was crossing over there to telephone.

Q. He took them while you were telephoning?

A. Yes, sir.

Q. How far would you naturally hear that gong if it was sounding?

A. Well, I should say about two blocks anyway.

Q. A good large heavy gong was it?

A. It certainly was.

Q. It was a rotary gong, or one that kept ringing?

A. Yes, sir.

Q. When you first started it, it rang for some time without cessation? A. Yes, sir.

Q. A heavy body you say struck the car?

A. Well, I heard something strike against the front of the car. I didn't know whether it was a team or what it was.

Q. Do you know how far the car ran after that heavy body struck it before it stopped?

A. Well, I should say about 15 or 20 feet.

Q. Are you guessing at that; did you measure it?

A. No.

Q. Are you guessing at it?

A. Well, I judge it didn't go any further than that as near [198—166] as I can estimate.

Q. Do you know that the rear end of the car was

(Testimony of R. E. Ward.)

entirely past the manhole when it stopped?

A. I couldn't tell you that.

Q. Did you get off the car at the rear end?

A. I got off the car at the rear end, yes.

Q. Where did you alight with reference to the manhole?

A. I don't remember where the manhole was.

Q. Did you alight on the crossing?

A. I don't remember that. When I jumped off I seen them picking up the man—

Q. Did the car move on a few feet and then stop after it stopped?

A. No, sir, it stayed there stationary.

Q. Do you recall the people passing around the rear of the car? A. I don't remember.

Q. Would you have left the car standing to block the traffic if it had been across the sidewalk or across the crossing, or would you have moved it on to clear the crossing—when your car stopped after the accident, if the body of the car had been opposite the crossing, would you have left it there or have moved it on a few feet?

A. That was up to the motorman.

Q. Well, it was up to you too, wasn't it?

A. Yes, it was up to me to give him the bells.

Q. Did you give him any bells for that purpose?

A. I did not.

Q. Would you have done so if the crossing had been blocked? [199—167]

A. Well, I suppose I would have in a case of that kind.

(Testimony of R. E. Ward.)

Mr. FALKNOR.—Not much traffic there, is there?

A. No—

Mr. EMERY.—Now, wait a moment; I am not through yet.

Q. How long have you worked for the company?

A. Since the 7th of September, 1912.

Q. Did you work at the street-car business before?

A. No.

Q. Was this your first accident?

Mr. FALKNOR.—I object to that as immaterial.

The COURT.—Objection sustained.

A. Well, it was the first accident, yes; bad one.

Q. Did you examine the man yourself at that time?

A. I did not.

Q. He was unconscious?

A. He was unconscious when they picked him up.

Q. Was he bleeding anywhere?

A. I couldn't say about that.

Q. Didn't you look at him and examine him?

A. I never examined him because I was taking—
at least I mean I was over across the street very busy telephoning to try to get the company.

Q. Telephoning for the company's doctor right away? A. Yes, sir.

Mr. EMERY.—That is all.

(Witness excused.) [200—168]

[Testimony of R. R. Higley, for Defendant.]

R. R. HIGLEY, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

(Testimony of R. R. Higley.)

Direct Examination.

(By Mr. FALKNOR.)

Q. You are connected with the Claim Department?

A. Yes, sir.

Q. And was in the vicinity of this accident soon after it happened, were you? A. Yes, sir.

Q. You met the company's physician going away from treating the man?

A. He said that it occurred.

Q. And then you went up and investigated the scene of the accident?

A. Yes, sir, I walked right up there.

Q. Immediately? A. Yes, sir, at once.

Q. Showing you Defendant's Exhibit 4, I will ask you if you made that? A. Yes, sir.

Q. I will ask you to come down here and explain to the jury the situation as you found it upon going up there [201—169] immediately after the accident. A. With reference to what?

Q. Well, to the planks and the hole surrounding it; especially the planks?

A. This side of the street was completely paved; this is the north side—or this is the west side between these tracks. The concrete base had been laid for paving but no paving put on it. This is asphalt here (indicating). This portion in here was excavated, dug out to approximately a foot in depth and that excavation was north of the north cross-walk—extending there and stopped at the south crossing; this portion here including the planking laid down to serve as cross-walks. This manhole was about

(Testimony of R. R. Higley.)

to this cross-walk which consisted of planks about three or four feet long laid in a north and south direction.

Q. They extended from the east rail over to the sidewalk?

A. From the east rail over to the sidewalk, yes. Under this south side of this plank crossing, or this plank that served as a crossing, and just north of this manhole, the dirt had fallen or come down about half the length of the planks; that is, when they had dug this excavation for this thing which was pretty close to these planks, the dirt, being sandy, it crumbled in and it extended about a foot and a half or two feet under these plank.

Q. How did it leave the end of those plank?

A. It left them teetering; that was from within about two foot of the rail—it commenced there at this end of these plank and about two feet from the track [202—170] and ran off about three feet.

Q. Toward the east? A. Toward the east.

Q. And extending about a foot and a half or two feet under? A. Something like that.

Q. Where was the cement board upon which the cement had been mixed?

A. Right here. This was near this rail and right at the center of 55th. That was a number of planks laid in there and the whole thing was probably 12 by 15 feet, I should judge; that is a rough guess. It looked just as if it had been built right there on the ground by putting something down for cross-boards and putting plank on it. Those were two-

(Testimony of R. R. Higley.)

inch plank and a foot in width. They varied to about three and a half to four feet.

Mr. FALKNOR.—That is all.

Q. (By a JUROR.) Was there a stringer laid under the ends of those planks?

A. No, sir, they were laid right down on the street.

Q. (By a JUROR.) Two of the planks projected over the hole?

A. Well, they projected about to the edge of the bottom of the hole and it tapered in then; broke in, but it might have been a little under these planks—the bottom—there were no girders under these planks at all. They were laid down flat on the street.

Q. (By a JUROR.) This man, passing down bricks, stood on these extended ends when he let the brick down?

A. I don't know. I didn't get there until after the accident. [203—171]

Mr. EMERY.—That was the contention as I understand it. I have no questions.

(Witness excused.) [204—172]

[Testimony of O. Davidson, for Defendant.]

O. DAVIDSON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FALKNOR.)

Q. You were in the vicinity of this accident when it happened? A. Yes, sir.

Q. How far? A. About a block.

Q. Which way? A. North.

(Testimony of O. Davidson.)

Q. About a block north? A. Yes, sir.

Q. Now, after the accident, did you go to the scene of the accident? A. Yes, sir.

Q. Did you make an examination in regard to these plank? A. Yes, sir.

Q. Have you seen this diagram that Mr. Higley just referred to? A. No, I have not.

Q. Did you notice any plank extending across from the sidewalk? [205—173]

A. Yes, there was.

Q. Did you make any special examination of those plank to see how they were laid or how it was excavated underneath? A. Yes.

Q. Explain to the jury what you found there.

A. Well, when I went up there I looked at that plank and it seems as though when they had excavated that the dirt had come from underneath the plank and had left these planking extending over in the hole probably a foot.

Q. If a person stepped on them, was there anything to prevent them from teetering up?

A. No, not anything.

Q. You are connected with the company, are you not? A. Yes, sir.

Q. In what capacity?

A. Transitman Inspector.

Q. You made this diagram here, marked exhibit 6, did you not?

A. No, I had that made under my directions.

Q. Well, it was made under your directions?

A. Yes, sir.

(Testimony of O. Davidson.)

Q. You assisted in taking the measurements?

A. Yes, sir.

Q. How far is it from the east rail to the center of this manhole or air-shaft?

A. Four feet four and one-half inches.

Mr. FALKNOR.—That is all. [206—174]

Cross-examination.

(By Mr. EMERY.)

Q. What is the gauge of that railroad?

A. Why, it is an 18-foot right of way.

Q. What is the gauge of the track?

A. Four feet eight and a half inches.

Q. Four feet eight and a half inches?

A. Yes, sir.

Q. How large or how wide is that hole in the ground there?

A. Why approximately five feet and a half.

Q. Mr. Kroon testified here that it was six feet; the hole in the ground was six feet. Do you think might be possibly so?

A. Why yes, it might be possible.

Q. You drew your map here to scale, didn't you?

A. Yes, sir.

Q. Why didn't you have that hole show six feet when this *this* is a four feet eight inch hole here shows about three feet; why didn't you show it the right size in proportion to the tracks, if your tracks are four feet eight inches and your hole ought to be a good deal wider than that. That is just like your plank. Go ahead. That is all.

(Testimony of O. Davidson.)

Mr. FALKNOR.—Let's not get excited about this here now. [207—175]

Redirect Examination.

(By Mr. FALKNOR.)

Q. You gave the dimensions of the hole on this plat, did you not? A. Yes, sir.

Q. They are all there? A. Yes, sir.

Q. All the figures are there? A. Yes, sir.

Q. The position of the hole from the track; now, the manhole on the top is about how big?

A. It is the large end, eight and five-eighths.

Q. This is made to scale, is it not? A. Yes, sir.

Q. A hole that size would require a circle this size (indicating)? A. Yes, sir.

Q. And then you indicated here the dimensions of the air shaft below the surface? A. Yes.

Q. And counsel could see that anyone could see that? A. Yes.

Mr. EMERY.—And the jury can see it from where they sit, too?

Mr. FALKNOR.—There was an insinuation that this was not drawn to scale. That is all. [208—176]

Mr. EMERY.—That is all.

(Witness excused.)

Mr. FALKNOR.—The defendant rests.

Defendant rests. [209—177]

Plaintiff's Testimony in Rebuttal.

**[Testimony of Charles J. Schlieff, in His Own Behalf
(Recalled in Rebuttal).]**

CHARLES J. SCHLIEF, the plaintiff, being recalled as a witness in his own behalf, having already been duly sworn, testified as follows:

Direct Examination.

(By Mr. EMERY.)

Q. You stated that you received pay from Krogh & Jessen for work done on 55th Street at the rate of \$2.75 per day? A. Yes, sir.

Q. How many hours did you work there?

Mr. FALKNOR.—I object to that.

A. Eight.

Mr. FALKNOR.—Just a moment. That is not rebuttal.

(Argument.)

The COURT.—Let it go in as part of the case in chief. It might be proper for that purpose.

Q. What was the fact. How many hours did you work per day when you got \$2.75?

A. Eight.

Q. And when you got \$3 a day in the carpenter work, how many hours did you work there?

A. Ten.

Q. And in the gravel pit? [210—178]

A. Ten.

Q. Were you accustomed on the day you were doing this work to stand on the teetering ends of planks projecting over that hole to pass the brick down to

(Testimony of Charles J. Schlieff.)

the man? A. No, sir.

Q. Did you stand in any such position as that?

A. No, sir.

Q. Did you get in any such position as that if you know?

Mr. FALKNOR.—I object to the Judge leading the witness.

The COURT.—Yes.

Mr. EMERY.—I am putting it just as you did exactly. That is all.

(Witness excused.)

(Adjournment until two o'clock P. M.) [211—179]

[Proceedings Had January 9, 1914, 2 P. M.]

(Upon reconvening at two o'clock P. M., January 9th, the following proceedings were had:)

[Motion for a Directed Verdict.]

Mr. FALKNOR.—The defendant at this time challenges the sufficiency of the evidence to sustain a verdict for the plaintiff, for the reason that the evidence at this time shows that there was no negligence of the defendant that contributed to or was the proximate cause of the injury, and the evidence introduced shows that any injuries the plaintiff received, if any, were caused by his own careless acts and negligence; and further for the reason that the evidence at this time shows that the plaintiff must look to the Workmen's Compensation Act for any relief, and asks that your Honor instruct the jury to return a verdict for the defendant, for the reasons above stated.

The COURT.—The motion is denied. I will submit the matter to the jury.

Mr. FALKNOR.—The defendant is allowed an exception.

The COURT.—Oh, yes. [212—180]

SECOND EXCEPTION.

The defendant, after the introduction of the evidence, and prior to the submission of the cause to the jury, duly requested the Court in writing to direct the jury to return a verdict for the defendant, which request was denied and the defendant duly and regularly excepted to the said ruling to the Court and the denial of said request, which exception was allowed.

The defendant in support of this exception submits the stenographic report of the trial herein, before set out in support of the First Exception, with all the exhibits, being all the evidence offered and received at the trial herein, and submits the same as a bill of exceptions in support of this its second exception.

THIRD EXCEPTION.

The defendant duly and regularly, prior to the argument of counsel, requested the Court to give the following charge:

“You are instructed that the motorman of the car in question had a right to presume that its preference and superior right in the use of its track would be respected by the plaintiff, and the motorman in charge of the car had a right to presume that as the car approached the place where the plaintiff was that the plaintiff would

not get upon the track in front of his car, or that if he was on the track or so near that he was in danger of being struck, that he would remove himself off the track and out of the way of danger, and I further charge you that the motor-man, relying upon such presumption, was not required to stop his car or even slacken the speed of his car until the danger of a collision between his car and the plaintiff became imminent."

The Court instructed as follows: [213—180a]

Court's Instructions.

The COURT.—You, Gentlemen of the Jury, have been selected in this case, and accepted as jurors by both sides because both sides have confidence in your fairness and honesty and integrity and rest upon the belief that you will approach the issue in this case with a fairness and impartiality which will insure justice to both of the litigants in the matter which they have presented. The attorneys are necessarily more or less partizan and their interest is in presenting the theory of their respective claims from the viewpoint which is pleasing to their idea. You, gentlemen, of course, approach the subject from an entirely different viewpoint. You are to divorce every fact from your mind other than the issue which is presented here by the testimony and the law, which it is my duty to give you, as bearing upon the matters and facts in this case. You will dispose of the issues with that fairness and singleness of purpose just the same as you would want twelve men to dispose of a matter for you, whether

you were plaintiff or whether you were defendant in this case.

The issue that you are to determine is formed by the complaint which is filed by the plaintiff and the answer which is submitted by the defendant. These papers you can take with you to the jury-room and read and determine just what is admitted and what is denied. The papers are not, however, to be considered as any evidence in the case, but simply to advise you of the contention made by the respective parties. [214—181]

You are advised that where a statement is admitted by the defendant, which is made by the plaintiff, that no proof need be offered upon that particular statement. That is taken as admitted and is considered as an established fact. The issue of fact, however, which you must determine is where a statement is made upon one side and denied by the other side. If the defendant should say that with relation to any particular fact stated in the complaint, it has no knowledge or information sufficient to form a belief, that that would place the plaintiff upon proof; but I see that all the denials in the answer are specific denials, so that the burden in all of these matters or allegations made by the plaintiff and denied by the defendant, is upon the plaintiff to establish by a fair preponderance of the evidence.

The burden is upon the plaintiff, in the first place to show that the plaintiff was injured and that his injury was caused by the negligence of the defendant, and that but for the act or conduct on the part of the defendant,—I mean by some act of omission

or commission, which was the proximate cause of the injury, the injury would not have happened.

The defendant pleads in its answer contributory negligence; and that is that the plaintiff was guilty of such conduct or such act of either commission or omission, but for which the injury would not have happened.

The burden is upon the defendant to establish the act of contributory negligence by a fair preponderance [215—182] of the evidence.

You are instructed that negligence is defined as the failure to observe for the protection of the interests of another, that degree of care, caution and vigilance which the circumstances demand, whereby such other person suffers an injury; it is the omission to do something which a reasonably prudent man, guided by the considerations which regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The basis of liability for negligence cases is the violation of some legal duty to exercise care.

You are instructed that contributory negligence is such conduct as exhibited the want or lack of ordinary care which, contributing to the acts of the defendant resulted in the injury as the proximate cause of such injury, and without which conduct on the part of the plaintiff, the injury would not have happened. As I have stated to you, the defendant alleging contributory negligence on the part of the plaintiff, this being denied by the plaintiff, shifts

the burden or casts the burden of proving this upon the defendant.

You are instructed that it is admitted that there is an ordinance of the city of Seattle which limits the rate of speed of street-cars in the business or settled residence districts to twelve miles an hour. You are instructed that if you find from the evidence that this accident or collision occurred in the business or settled district of the city of Seattle, and that at the time of the accident the street-car was going at a greater rate [216—183] of speed than twelve miles an hour, then such act would constitute negligence upon the part of the defendant; but the fact that the car was going at a greater rate of speed than twelve miles an hour would not make the defendant liable for the injury if you should find from the evidence that such act of speed above twelve miles an hour was not the proximate cause of the injury, or if you find from the evidence that the plaintiff was guilty of contributory negligence; that is, the failure to exercise such ordinary care as the circumstances demanded which ordinarily prudent men would exercise under such circumstances, and that his negligence, combining and occurring with the rate of speed which the car was running, contributed to the injury as the proximate cause of the injury, and without such contributory negligence on the part of the plaintiff, the injury would not have taken place.

You are instructed that ordinary care is such a degree of care and caution as a reasonably prudent man would use under like circumstances and condi-

tions. The care required in operating street-cars or by persons employed adjacent to street-car tracks is such as an ordinarily prudent and cautious man would exercise under like circumstances and conditions. It is proportionate to the danger to be guarded against and the fatal consequences which are likely to ensue if it is omitted. A greater degree of care and caution is required in the operating of a street-car along a street where men are employed and improvements are being made, which are known to the defendant, adjacent to the track; and [217—184] this is emphasized where the improvement is adjacent to the railway tracks where men are upon and off of the track constantly and irregularly, in the performance of the work in which they are engaged, and this same rule applies to a person who is at work which is adjacent to a street-car track. The rule applies equally to both parties, and the diligence which is required by either party places upon both parties a duty and responsibility which requires of them cautious conduct commensurate with the danger to be guarded against, and the party who fails in the exercise of that diligence, care and caution which the circumstances demand, and because of such failure fatal consequences result, such party is held responsible for such fatal consequences. If in this case, you should find that the plaintiff failed to exercise that degree of care and caution which the circumstances demanded, and because of such failure on his part as the proximate cause thereof he was injured, even though you might find that the defendant likewise failed to exercise

that care and caution which the circumstances demanded, but find that the negligence on the part of the plaintiff, mingling with that of the defendant resulted in the injury and the acts of omission on the part of the plaintiff was the proximate cause thereof and without such act on his part the injury would not have occurred, the plaintiff, under such circumstances cannot recover. On the other hand, if you should find that the plaintiff was negligent, but should further find that such negligence on the part of the plaintiff was not the proximate cause of his injury, [218—185] but that the defendant was negligent, and that the negligence of the defendant was the proximate cause of the injury and without which negligence on the part of the defendant the injury would not have happened, then the defendant would be liable, although the plaintiff was negligent to some degree, as stated to you a moment ago.

If the injury in this case was caused by an act which cannot be accounted for in any other way than that it was an accident,—an event which occurred without fault of either *part* or without the fault of the defendant, then the plaintiff cannot recover in this case.

You are instructed, Gentlemen of the Jury, that you fix the standard for reasonable and prudent men under the circumstances in this case, as you find them, according to your judgment and experience, or what that class of men would do under the circumstances as detailed by the witnesses and evidence in this case, taking into consideration all of the circumstances as detailed to you upon the witness-stand,

and all of the facts and circumstances as disclosed upon the trial, and try it by that standard. The Judge who tries the case cannot supply you with that criterion of judgment. There is no fixed standard in law by which a Court is enabled to arbitrarily say in every case what the conduct shall be considered reasonably prudent, and what shall constitute ordinary care under all circumstances. What might be deemed ordinary care in one case, in another might be gross negligence. The policy of the law has [219—186] therefore relegated such questions to the jury, and under the instructions given you, you must find the standard of care of ordinarily prudent men as applied to the circumstances as you find them in this case. You will take into consideration the street, the improvements that were being made upon the street, the proximity of the improvements upon the street upon which plaintiff was injured to the railway track, the character of work he was doing, the manner in which the work was being performed, the operation of the street-car, the distance the men employed upon this improvement could be seen by the parties operating the street-car, the speed at which the car was operated, the signal or lack of signal given by the men operating the car, the employment of the plaintiff as to the things that he was doing at the time, and the manner in which they were performed, and from all of the facts and circumstances as disclosed in this case determine the right, as twelve honest men with the determination of doing justice between these litigants. Bring to bear upon the issue in this case the same consider-

ation and approach the subject from the same viewpoint and weigh it with the issue—weigh the issue with like concern as you would want twelve men to weigh, consider and determine a matter of like concern to you if you were either plaintiff or defendant in this case.

You are instructed that as a matter of law the defendant company and the plaintiff in this case had equal rights to be upon the street at the point of the accident, and each was required to exercise care and [220—187] caution to avoid an injury, except that a street-car running upon fixed tracks cannot change or alter its course in running, and it is the duty of a person in walking, standing or working near a street railway track upon the streets to so regulate his position and his conduct as to permit the cars to run upon the track and use reasonable care in avoiding a collision. And a person is required to make reasonable use of his eyes and ears; that is, he is required to look and listen for approaching cars when employed near the track and to do such acts as a reasonably prudent man would under like circumstances. The defendant company cannot, however, recklessly run its car at a speed to exceed the limit which is fixed by law without ringing a bell or sounding a gong, irrespective of the presence of the plaintiff's employment near its track.

You are further instructed that the defendant railway company had the right to rely upon the fact that the street along the line of railway would not be used by persons in any other than a reasonable and usual manner, taking into consideration

the improvement that was being made at the time near to its track; and the company was required to exercise reasonable care and caution such as an ordinarily prudent man would under similar circumstances, taking into consideration the improvements that were being made there and the dangers that were apparent by reason of the employment of the plaintiff and others in close proximity to its track. [221—188]

You are instructed that the plaintiff in his employment upon the street at the point of accident, if you find one did take place, had the right to rely upon the fact that the defendant company would not run its car faster than the limit of speed required by the ordinance, and the motorman operating the car would give the usual warning by ringing a bell or sounding a gong to advise plaintiff of the approach of the car; and the motorman operating the car had the right to rely upon the fact that the plaintiff would act as a reasonably prudent man, and would not heedlessly step in front of a car. The duties of the several parties were reciprocal, and each had the right to believe and govern his act accordingly, that the other would act as a reasonably prudent man under similar circumstances.

The mere fact that the plaintiff was injured is no evidence of liability on the part of the defendant, nor is the fact that the car was running more than twelve miles an hour evidence of negligence which was the proximate cause of the inquiry. You are instructed, however, that if, by a fair preponderance of the evidence, you believe that the car was running

more than twelve miles an hour at the place of the accident, the burden of proof, would by such act be shifted to the defendant to show by a fair preponderance of the evidence that the injury, if one was sustained, was the result of contributory negligence on the part of the plaintiff, and that such negligence was the proximate cause of the injury, and without which it would not [222—189] have happened, or if you believe that the injury was the result of an accident, as stated a while ago,—against which neither party could guard against, the plaintiff is remediless.

You are further instructed that in case you should find the plaintiff was working to the north of the manhole in question and at a place where the car could have passed, that as the car was in close proximity at a time when it was impossible to stop the car in time to avoid injuring him,—as the car approached within ten or twelve feet of where the plaintiff was, the plaintiff stepped upon the track, either through the teetering or unsteady effect of a board or otherwise, then you are instructed that the plaintiff, under such circumstances, cannot recover, and it would be immaterial under such circumstances at which rate of speed the car was moving or whether bells were rung or a gong sounded or not.

You are instructed that one of the defenses in this case is that the plaintiff was employed in extra-hazardous work, an employment which comes within the scope of the State Industrial Insurance Act, and that because of the provisions of that Act, he cannot

recover in this case. You are instructed that under the evidence as it is presented before you in this case, that the Act does not apply to the issue before you for consideration, and that you will entirely disregard such defense on the part of the defendant, and determine this case entirely upon the evidence which has been admitted as to the negligence [223—190] on the part of the defendant or the contributory negligence on the part of the plaintiff as outlined and defined in these instructions.

You are instructed that what is meant by a preponderance of the evidence is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of the evidence is you should take into consideration the opportunities of the several witnesses for seeing and knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the action; the probability or improbability of the truth of their several statements in view of the other evidence, facts and circumstances proved in the trial, and from all of these circumstances determine upon which side the weight or preponderance of the evidence is. Where two witnesses testify opposite to each other on a material point and are the only ones that testify directly to such point, you are not bound to consider the evidence equally balanced or the point not proved; you may give credence to one witness over another, if you find such facts and circumstances warrant it. The test is, which testimony has the greatest convince-

ing power to your mind, which conveys to your mind the truth with relation to the issue which is presented.

You will try this case solely upon the evidence which has been offered and admitted before you and the law as I have given it to you, disregarding every statement [224—191] of counsel made upon the trial of this cause, either in the presentation of testimony or argument before you upon the facts where the statement is not sustained by the evidence. You will also disregard any remark or statement made by me upon the trial of this cause is passing upon any legal proposition that was presented, and divesting your mind of every other element save and except the testimony as it was admitted by the Court and the law as it is now given to you.

You will consider and weigh the evidence in this case as reasonable men and endeavor to come to an honest conclusion, divesting your mind, as has been stated to you, of all prejudices of all kinds and sympathies of every nature, and arrive at your conclusion unbiased, and endeavor to give this case the same consideration that you would want twelve men to give to a matter of yours of like concern to you.

If you should find for the plaintiff, you will find for such sum or sums as will fairly compensate him for the loss he has suffered and compensate him for the pain and physical suffering he has endured, and is reasonably certain to suffer in the future. If you find for the plaintiff, you will estimate his damage on a strictly pecuniary basis, allowing such sum as will fairly compensate him for the suffering he has

endured and will be reasonably certain to endure in the future, and such loss as he has sustained in earning capacity and is reasonably certain to suffer in the future. You are instructed that the law does not lay down any definite [225—192] set of rules by which the damage may be reached, but this is left largely to the discretion of the jury, excepting the loss in earning capacity to the present time, and also the sums expended in effecting a cure, if you find any shown by the evidence. You must therefore determine as reasonable men, what sum, if any, should be allowed to the plaintiff, taking into consideration all the evidence bearing upon the extent of the injury. You cannot, however, find for him in a greater sum than has been prayed for in the complaint.

You, Gentlemen of the Jury are the sole judges of the facts in this case, and you must determine what the facts are. If I have referred to any fact in this case it is not to indicate any opinion I may have of a single fact but simply stating some proposition of law which has involved the facts. You are likewise the sole judges of the credibility of the witnesses who have testified before you, and in determining the weight of the credence you will attach to the testimony of any witness, you will take into consideration the demeanor of the witness on the witness-stand; his apparent candor or lack of candor; his interest or lack of interest; the opportunity of the witnesses for knowing the things about which they testify; the reasonableness of the story of the several witnesses who have testified, and from all of these, determine the weight of the evidence that has been offered and

admitted. If you should find that any witness has willfully testified falsely concerning any material fact in this case, you will have the right to disregard his entire testimony, except in so far [226—193] as it may be corroborated by other credible evidence detailed on the trial of this case.

Immediately upon retiring to the jury-room you will elect one of your number foreman and when you have agreed upon a verdict you will cause it to be signed by your foreman and report to the Court.

Two forms of verdict will be submitted to you, one reading as follows: "We, the jury in the above-entitled cause, find for the plaintiff and assess his damages in the sum of ——— dollars." If you should find for the plaintiff you will compute the amount and insert it in this verdict and cause it to be signed by your foreman. If you should find for the defendant this will be your form of verdict: "We, the jury in the above-entitled cause, do find for the defendant." If that is your verdict, you will cause that to be signed by your foreman. It will require your entire number of twelve to agree upon a verdict. I do not think of anything else. The bailiffs may be sworn and take you to the jury-room. If there is anything else that occurs to me I will call you back and advise you further.

A JUROR.—Your Honor, there is one point in your instructions that I did not catch fully; referring to if the plaintiff had stepped accidentally on the line when the car was only ten or twelve feet away, then it didn't make any difference as to the speed of the car and the ringing of the bell—did I understand that?

The COURT.—If you should find that the plaintiff, accidentally, either intentionally or otherwise, stepped in front of [227—194] the car when the car was within ten or twelve feet, why it would be immaterial as to the speed at which the car was moving, as there is not any testimony that the car could have been stopped in that time, and that is not an issue. That is a matter for you to determine.

Mr. EMERY.—The question of whether they were ringing the bell at that time to warn him might be very material.

The COURT.—As to whether the bell was rung prior to their coming to that point, that is a matter for your consideration. You may swear the bailiffs.

(Bailiffs sworn.)

(Jury retires.) [228—195]

The foregoing are all the instructions given by the Court.

To the action of the Court in refusing to give the above-requested instruction, the defendant, through its attorneys, duly excepted, for the reason that said instruction was particularly applicable to the facts and that no instruction given by the Court covered the same. The defendant in support of this exception submits the stenographic report of the trial heretofore set out in support of the First Exception, with all the exhibits, being all of the evidence offered and received at the trial herein, and submits the same as a bill of exceptions in support of this its third exception.

FOURTH EXCEPTION.

The defendant duly and regularly prior to the

argument of counsel requested the Court to give the following charge:

“You are further instructed that it was the duty of the plaintiff to use his senses, his eyes and his ears, especially when working in or about a place where a collision with a car was likely to occur, in order to discover the proximity of a passing car of the defendant, and his failure so to do would constitute contributory negligence and prevent any recovery on his part. The law requires one working in or about a street-car track to be on the lookout and to listen for approaching cars, and if you find in this case that the plaintiff failed to look and listen and that had he looked and listened he would have discovered the car, then his failure so to do would constitute contributory negligence and he cannot recover, and your verdict should be for the defendant.”

To the action of the Court in refusing to give the above requested instruction, the defendant, through its attorneys, duly excepted, for the reason that said instruction was particularly applicable to the facts and that no instruction given by the Court covered the same, and that the failure to give the same was prejudicial to the defendant. The defendant in support of this exception submits the stenographic [229—196] report of the trial hereinbefore set out in support of the First Exception, with all the exhibits, being all of the evidence offered and received at the trial herein, together with the Court's instructions set out in defendant's Second Exception as a

bill of exceptions in support of this its fourth exception.

FIFTH EXCEPTION.

The defendant duly and regularly, prior to the argument of counsel, requested the Court to give the following charge:

“I charge you that in this case that the plaintiff was in the employ of a contractor in the performance of work covered and included under the law of the State of Washington relating to compensation for injured workmen, and that he was engaged at such work at the plant of his employer and that under such law relating to compensation of injured workmen plaintiff is required to look to the State of Washington for compensation for injuries received herein.”

To the action of the Court in refusing to give the above-requested instruction, the defendant, through its attorneys, duly excepted, for the reason that said instruction was particularly applicable to the facts and that no instruction given by the Court covered the same, and that the failure to give the same was prejudicial to the defendant. The defendant in support of this exception submits the stenographic report of the trial hereinbefore set out in support of Exception I with all the exhibits, being all of the evidence offered and received at the trial herein, together with the Court's instructions set out in defendant's Second Exception as a bill of exceptions in support of this its fifth exception.

SIXTH EXCEPTION.

In the charge of the Court to the jury, the Court

gave the following instruction: [230—197]

“The defendant company cannot, however, recklessly run its cars at a speed irrespective of the presence of the plaintiff’s employment near its track.”

to the giving of which the defendant duly excepted, which exception was allowed.

The above and foregoing transcription of the evidence introduced upon the trial offered in support of the defendant’s First Exception is all the evidence given upon the trial of the action, and the defendant offers the same with all the exhibits, together with the Court’s instructions set out in defendant’s Third Exception, as a bill of exceptions in support of this its sixth exception.

SEVENTH EXCEPTION.

In the charge of the Court to the jury, the Court gave the following instruction:

“You are instructed that one of the defenses in this case is that the plaintiff was employed in extra-hazardous work, an employment which comes within the scope of the State Industrial Insurance Act, and that because of the provisions of that Act, he cannot recover in this case. I instruct you that under the evidence as it is presented before you in this case, that the act does not apply to the issue before you for consideration and that you will entirely disregard such defense on the part of the defendant and determine this case entirely upon the evidence which has been admitted as to the negligence on the part of the defendant, or contributory negli-

gence on the part of the plaintiff, as outlined and defined in these instructions.”

to the giving of which the defendant duly excepted, which exception was allowed.

The above and foregoing transcription of the evidence introduced upon the trial, offered in support of the defendant's First Exception, is all the evidence given upon the trial of the action, and the defendant offers the same with all the exhibits, together with the Court's instructions set out in defendant's Third Exception, as a bill of exceptions in support of this its seventh exception. [231—198]

EIGHTH EXCEPTION.

In the charge of the Court to the jury, the Court gave the following instruction:

“You are instructed, however, that if by a fair preponderance of the evidence, you believe that the car was running more than twelve miles an hour at the place of the accident, the burden of proof would, by such act be shifted to the defendant to show by a fair preponderance of the evidence that the injury, if one was sustained, was the result of contributory negligence on the part of the plaintiff and that such negligence was the proximate cause of the injury and without which it would not have happened.”

to the giving of which the defendant duly excepted, which exception was allowed.

The above and foregoing transcription of the evidence introduced upon the trial, offered in support of the defendant's First Exception, is all the evidence given upon the trial of the action, and the defendant

offers the same with all the exhibits, together with the Court's instructions set out in defendant's Third Exception, as a bill of exceptions in support of this its eighth exception.

Whereupon counsel for the defendant presents the foregoing as its Bill of Exceptions in the above case and prays that the same may be settled, allowed, signed and certified by the Judge of said court.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Defendant. [232—199]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No.—.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Order Allowing Bill of Exceptions.

The foregoing Bill of Exceptions, proposed by the defendant, consisting of pages 1 to 199, inclusive, having been duly served upon the attorneys for the plaintiff within due time, and the attorneys for plaintiff not having proposed any amendments and waiving any further time in which to propose any amendments to said Bill of Exceptions, and said Bill of

Exceptions having been duly delivered by the proposing party to the Clerk of the above court for the Judge thereof, and said Clerk having delivered said Bill of Exceptions to the Judge of said Court, and the attorneys for both plaintiff and defendant being present and consenting to the settling of said Bill of Exceptions, and said Bill of Exceptions conforming to the truth and being in proper form;

Now, therefore, I, the undersigned Judge of the above-named court and the Judge who tried the above-entitled action, hereby certify that the above and foregoing bill is a true bill of exceptions. The same is approved, allowed and settled, and ordered filed and made a part of the record in said cause.

Done in open court this 29th day of January, 1914.

JEREMIAH NETERER,

Judge. [233]

O. K.—G. D. E.

Copy of within proposed Bill of Exceptions of defendant received and service acknowledged this 27th day of January, 1914.

GEO. D. EMERY,

Attorney for Plaintiff.

[Indorsed]: Defendant's Proposed Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 29, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [234]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Comes now the Puget Sound Traction, Light & Power Company, a corporation, the defendant above named, in connection with its petition for writ of error herein, and makes the following assignment of errors, and particularly specifies the following as the error upon which it will rely and which it will urge upon the prosecution of its said writ of error in the above-entitled cause, and which it avers occurred upon the trial of said cause, to wit:

I.

The Court erred in rendering judgment in favor of the plaintiff and against the defendant.

II.

The Court erred in overruling and denying defendant's challenge to the sufficiency of the evidence to sustain the verdict for the plaintiff and in overruling defendant's motion to instruct the jury to return a verdict for the defendant.

III.

The Court erred in overruling defendant's motion

for a new trial. [235]

IV.

The Court erred in refusing to give the following instruction to the jury requested by defendant, to wit:

“You are instructed to return a verdict in favor of defendant and against the plaintiff.”

V.

The Court erred in refusing to give the following instruction:

“You are instructed that the motorman of the car in question had a right to presume that its preference and superior right in the use of its track would be respected by the plaintiff, and the motorman in charge of the car had a right to presume that as the car approached the place where the plaintiff was that the plaintiff would not get upon the track in front of his car, or that if he was on the track or so near that he was in danger of being struck, that he would remove himself off the track and out of the way of danger, and I further charge you that the motorman relying upon such presumption was not required to stop his car or even slacken the speed of his car until the danger of a collision between his car and the plaintiff became imminent.”

VI.

The Court erred in refusing to give the following instruction to the jury requested by the defendant, to wit:

“You are further instructed that it was the duty of the plaintiff to use his senses, his eyes

and his ears, especially when working in or about a place where a collision with a car was likely to occur, in order to discover the proximity of a passing car of the defendant, and his failure so to do would constitute contributory negligence and prevent any recovery on his part. The law requires one working in or about a street-car track to be on the lookout and to listen for approaching cars, and if you find in this case that the plaintiff failed to look and listen and that had he looked and listened he would have discovered the car, then his failure so to do would constitute contributory negligence and he cannot recover, and your verdict should be for the defendant."

VII.

The Court erred in refusing to give the following instruction to the jury requested by the defendant, to wit: [236]

"I charge you that in this case that the plaintiff was in the employ of a contractor in the performance of work covered and included under the law of the State of Washington relating to compensation for injured workmen, and that he was engaged at such work, at the plant of his employer and that under such law relating to compensation of injured workmen plaintiff is required to look to the State of Washington for compensation for injuries received herein."

VIII.

The Court erred in giving the following instruction to the jury, to wit:

"The defendant company cannot, however,

recklessly run its cars at a speed irrespective of the presence of the plaintiff's employment near its track."

IX.

The Court erred in giving the following instruction to the jury, to wit:

"You are instructed that one of the defenses in this case is that the plaintiff was employed in extra-hazardous work, an employment which comes within the scope of the State Industrial Insurance Act, and that because of the provisions of that Act, he cannot recover in this case. I instruct you that under the evidence as it is presented before you in this case, that the act does not apply to the issue before you for consideration and that you will entirely disregard such defense on the part of the defendant and determine this case entirely upon the evidence which has been admitted as to the negligence on the part of the defendant, or contributory negligence on the part of the plaintiff, as outlined and defined in these instructions."

X.

The Court erred in giving the following instruction to the jury, to wit:

"You are instructed, however, that if by a fair preponderance of the evidence, you believe that the car was running more than twelve miles an hour at the place of the accident, the burden of proof would, by such act be shifted to the defendant to show by a fair preponderance of the evidence that the injury, if one was sustained,

was the result of contributory negligence on the part of the plaintiff and that such negligence was the proximate cause of the injury and without which it would not have happened." [237]

Wherefore said Puget Sound Traction, Light & Power Company, plaintiff in error, prays that said judgment of the District Court of the United States for the Western District of Washington, Northern Division, be reversed, and that said Court be instructed to grant a new trial of said cause.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Defendant.

[Indorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 1, 1914, 1:40 P. M. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [238]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

And now comes Puget Sound Traction, Light & Power Company, a corporation, defendant herein,

and says: That on the 13th day of January, 1914, this Court entered judgment herein in favor of the plaintiff above named and against the defendant above named, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will appear in detail from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record and proceedings, with all things concerning the same, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Defendant. [239]

[Indorsed]: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 1, 1914, 1:40 P. M. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [240]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,
Defendant.

Order Allowing Writ of Error.

On this 1st day of April, 1914, came the defendant Puget Sound Traction, Light & Power Company, a corporation, by its attorneys, and filed herein and presented to the Court its petition, praying for the allowance of a writ of error and an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings in said cause, with all things concerning the same, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

On consideration whereof, the Court does hereby allow the writ of error prayed for. It is further ordered that a bond, in the sum of Four Thousand Dollars (\$4,000.00), conditioned according to law, be executed in behalf of the above-named defendant, with good and sufficient surety, to be approved by the undersigned, and that upon said bond being executed, approved and filed, the said judgment in this cause shall forthwith be superseded and all proceedings in this cause stayed until the final determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit. [241]

Dated this 1st day of April, 1914.

JEREMIAH NETERER,

District Judge of the United States, for the Western
District of Washington, Presiding in said Cir-
cuit.

[Indorsed]: Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 1, 1914, 2:10 P. M. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [242]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Puget Sound Traction, Light & Power Company, a corporation, defendant above named as principal, and the Massachusetts Bonding & Insurance Company, a corporation duly organized and existing under and by virtue of the laws of the State of Massachusetts, and duly authorized and empowered to become surety upon bonds and to transact business as a surety company in the State of Washington, as surety, are held and firmly bound unto Charles J. Schleif, plaintiff above named, in the sum of Four Thousand Dollars (\$4,000), lawful money of the United States, to be paid to said Charles J. Schleif, his heirs, executors,

administrators and assigns for which payment, well and truly to be made, we do hereby bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Seattle, Washington, this 1st day of April, A. D. 1914.

Whereas, lately, at a District Court of the United States, for the Western District of Washington, Northern Division, [243] in a suit pending in said court, between Charles J. Schleif, and Puget Sound Traction, Light & Power Company, a corporation, defendant, a judgment was rendered in favor of said plaintiff and against said defendant in the sum of One Thousand Four Hundred and Seventy Dollars (\$1,470.00) and costs, and the said Puget Sound Traction, Light & Power Company having obtained a writ of error, and filed a copy thereof in the office of the clerk of said court, to reverse the judgment in the aforesaid suit, and a citation directed to said Charles J. Schleif, plaintiff, as aforesaid, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, in said circuit;

Now, therefore, the condition of the above obligation is such that if the said Puget Sound Traction, Light & Power Company shall prosecute its writ of error to effect and shall answer all costs and damages that may be awarded against it, including all just damages for delay and costs and interest on the appeal, if it shall fail to make its plea good, then the above obligation to be void; otherwise to remain in

full force and effect.

It is hereby expressly agreed by said surety that in case of a breach of any condition hereof, the above-named District Court of the United States for the Western District of Washington, Northern Division, may, upon notice to said surety of not less than ten (10) days, proceed summarily in the above-entitled action to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety, and award execution therefor. [244]

PUGET SOUND TRACTION, LIGHT &
POWER COMPANY,

By A. L. KEMPSTER,

[Corporate Seal]

Manager.

Attest: JAMES B. HOWE,

Assistant Clerk.

MASSACHUSETTS BONDING & INSUR-
ANCE COMPANY,

[Corporate Seal]

By FRED B. ROTWIN,

Attorney in Fact.

The foregoing bond is hereby approved as a bond on writ of error and supersedeas bond, this 1st day of April, 1914.

JEREMIAH NETERER,

Judge of the District Court of the United States, Presiding in the United States District Court for the Western District of Washington, Northern Division.

[Endorsed]: Bond on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washing-

ton, Northern Division, Apr. 1, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [245]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Proof of Service.

State of Washington,
County of King,—ss.

E. A. La Fortune, being first duly sworn, on oath deposes and says: That on the 2d day of April, 1914, he served the Assignment of Errors, Petition for Writ of Error, Bond on Writ of Error and Order Allowing Writ of Error, upon the plaintiff by leaving true and correct copies thereof with the stenographer in charge of the office of Geo. D. Emery, attorney for plaintiff, 419 Central Building, Seattle, Washington, the said Geo. D. Emery being then and there absent from said office and said city.

Further affiant saith not.

E. A. LA FORTUNE.

Subscribed and sworn to before me this 6th day of April, 1914.

[Seal]

R. G. SHARPE.

Notary Public in and for the State of Washington,
Residing at Seattle. [246]

[Endorsed]: Proof of Service. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 6, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [247]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 2508.

CHARLES J. SCHLEIF.

Plaintiff,

VS.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Order [Directing Certification of Certain Original Exhibits].

IT IS HEREBY ORDERED that Plaintiff's Exhibits "A" to "H," inclusive, and Defendant's Exhibits 1 to 12, inclusive, need not be set out by copy or otherwise in the transcript of record upon writ of error, but that the same shall be certified up to the Circuit Court of Appeals for the Ninth Circuit with the transcript of the Bill of Exceptions.

Dated this 10th day of April, 1914.

JEREMIAH NETERER,

Judge.

[Endorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 10, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [248]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2508.

CHARLES J. SCHLEIF,

Defendant in Error,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Plaintiff in Error.

Praeceptum for Transcript of Record.

To the Clerk of the above-entitled Court:

You will please prepare, certify and forward, as provided by law, to the United States Circuit Court of Appeals, for the Ninth Circuit, as the record on writ of error to the District Court of the United States, for the Western District of Washington, Northern Division, a complete transcript of the following files, records and proceedings in the above-entitled cause, to wit:

Complaint.

Answer.

Reply.

Verdict.

Judgment.

Petition for New Trial.

Order Overruling Petition for New Trial.

Stipulation for Extension of Time to File Bill of
Exceptions.

Order Granting Extension of Time to File Bill of
Exceptions. [249]

Bill of Exceptions and Proof of Service Thereto At-
tached.

Assignment of Errors.

Petition for Writ of Error.

Order Allowing Writ of Error.

Bond on Writ of Error.

Order.

Original Writ of Error.

Original Citation and Marshal's Return of Service
Thereon.

Affidavit of E. A. La Fortune.

This Praecept.

JAMES N. HOWE,
A. J. FALKNOR,
Attorneys for Defendant.

[Indorsed]: Praecept for Transcript of Record.
Filed in the U. S. District Court, Western Dist. of
Washington, Northern Division, Apr. 6, 1914. Frank
L. Crosby, Clerk. By Ed M. Lakin, Deputy. [250]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

**Certificate of Clerk U. S. District Court to Trans-
script of Record, etc.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 263 typewritten pages, numbered from 1 to 263, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for by counsel herein in their Praecipe, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington to the United

States Circuit Court of Appeals for the Ninth Circuit. [251]

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S. as Amended by Sec. 6, Act of March 2, 1905) for mak- ing transcript of the record for printing purposes—	
560 folios at 30c per folio.....	\$168.00
Certificate of Clerk to typewritten transcript of record—3 folios.....	.90
Seal to said certificate.....	.40
Certificate of Clerk to original exhibits— 3 folios.....	.90
Seal of said certificate.....	.40
	<hr/>
	\$170.60

I hereby certify that the above cost for preparing and certifying record amounting to \$170.60 has been paid to me by Messrs. James B. Howe and A. J. Falknor, attorneys for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court

at Seattle, in said District, this 13th day of April, 1914.

[Seal]

FRANK L. CROSBY,

Clerk.

Ed M. Lakin,

Deputy. [252]

Writ of Error [Copy].

UNITED STATES OF AMERICA.

The President of the United States of America, to the Honorable the Judges of the District Court of the United States, for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment upon a verdict which is in the said District Court before you, or some of you, between Charles J. Schleif, the original plaintiff and defendant in error, and Puget Sound Traction, Light & Power Company, a corporation, the original defendant and plaintiff in error, manifest error hath happened to the damage of said Puget Sound Traction, Light & Power Company, plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you

have the same at San Francisco, California, in said circuit, on the 1st day of May next; and that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, which of right and according to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 1st day of April, in the [253] year of our Lord one thousand nine hundred and fourteen.

[Seal of the U. S. District Court, Western Dist. of Wash.]

FRANK L. CROSBY,
Clerk of the United States District Court for the
Western District of Washington.

Ed M. Lakin,
Deputy.

Allowed by:

JEREMIAH NETERER,
District Judge of the United States, Presiding in the
District Court of the United States, for the
Western District of Washington, Northern Di-
vision.

Dated April 1st, 1914.

Received this 1st day of April, 1914, a true copy

of the foregoing writ of error, for the defendant in error.

FRANK L. CROSBY,

Clerk of the District Court of the United States for
the Western District of Washington, Northern
Division.

By Ed M. Lakin,
Deputy.

[Indorsed]: Original. No. 2508. In the District Court of the United States for the Western District of Washington, Northern Division. Charles J. Schleif, Plaintiff, vs. Puget Sound Traction, Light & Power Co., a Corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 1, 1914, 2:12 P. M. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. James B. Howe, A. J. Falknor, P. O. and Office Address, Room 403 Electric Building, 7th Ave. and Olive St., Seattle, Wash., Attorneys for Defendant. [254]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Citation on Writ of Error [Copy].

United States of America.

The President of the United States of America, to
Charles J. Schleif, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of said court, in the city of San Francisco, in the State of California, within thirty (30) days after the date of this citation, pursuant to writ of error filed in the clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein Puget Sound Traction, Light & Power Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 1st [255] day of April, in the year of our Lord one thousand nine hundred and fourteen.

JEREMIAH NETERER,

Judge of the District Court of the United States,
Presiding in the District Court of the United
States for the Western District of Washington,
Northern Division.

RETURN ON SERVICE OF WRIT.

United States of America,

Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Charles J. Schleif, by handing to and leaving a true and correct copy thereof with Mrs. Clara Schleif, his wife, personally, at his regular place of abode, at Seattle, in said District, on the 2d day of April, A. D. 1914.

JOHN M. BOYLE,

U. S. Marshal.

By Wm. D. Downey,

Deputy.

Marshal's fees, \$2.36.

RETURN ON SERVICE OF WRIT.

United States of America,

Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on Geo. D. Emery, by handing to and leaving a true and correct copy thereof with Miss Elva Perry, stenographer for Geo. D. Emery, personally, at Seattle, in said District on the 2d day of April, A. D. 1914, in accordance with request of attorneys for defendants.

JOHN M. BOYLE,

U. S. Marshal.

By Wm. D. Downey,

Deputy. [256]

Marshal's fees, \$2.06.

[Indorsed]: Original. No. 2508. In the District Court of the United States for the Western District of Washington, Northern Division. Charles J.

Schleif, Plaintiff, vs. Puget Sound Traction, Light & Power Co., a Corporation, Defendant. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 3, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. James B. Howe, A. J. Falknor, P. O. and Office Address, Room 403 Electric Building, 7th Ave. and Olive St., Seattle, Wash., Attorneys for Defendants.
[257]

Writ of Error [Original].

UNITED STATES OF AMERICA.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States, for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment upon a verdict which is in the said District Court before you, or some of you, between Charles J. Schleif, the original plaintiff and defendant in error, and Puget Sound Traction, Light & Power Company, a corporation, the original defendant and plaintiff in error, manifest error hath happened to the damage of said Puget Sound Traction, Light & Power Company, plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals

for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said circuit, on the 1st day of May next; and that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, which of right and according to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 1st day of April, in the [258] year of our Lord one thousand nine hundred and fourteen.

[Seal]

FRANK L. CROSBY,

Clerk of the United States District Court for the Western District of Washington.

Ed M. Lakin,
Deputy.

Allowed by:

JEREMIAH NETERER,

District Judge of the United States, Presiding in the District Court of the United States, for the Western District of Washington, Northern Division.

Dated April 1st, 1914.

Received this 1st day of April, 1914, a true copy of the foregoing writ of error, for the defendant in error.

FRANK L. CROSBY,

Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

By Ed M. Lakin,
Deputy. [259]

[Endorsed]: No. 2508. In the District Court of the United States for the Western District of Washington, Northern Division. Charles J. Schleif, Plaintiff, vs. Puget Sound Traction, Light & Power Co., a Corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 1, 1914, 2:12 P. M., Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [260]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2508.

CHARLES J. SCHLEIF,

Plaintiff,

vs.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Defendant.

Citation on Writ of Error [Original].

United States of America.

The President of the United States of America, to
Charles J. Schleif, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of said court, in the city of San Francisco, in the State of California, within thirty (30) days after the date of this citation, pursuant to writ of error filed in the clerk's office of the District Court of the United States, for the West-

ern District of Washington, Northern Division, wherein Puget Sound Traction, Light & Power Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 1st [261] day of April, in the year of our Lord one thousand nine hundred and fourteen.

JEREMIAH NETERER,
Judge of the District Court of the United States,
Presiding in the District Court of the United
States for the Western District of Washington,
Northern Division. [262]

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Charles J. Schleif by handing to and leaving a true and correct copy thereof with Mrs. Clara Schleif, his wife, personally, at his regular place of abode at Seattle, in said District, on the 2d day of April, A. D. 1914.

JOHN M. BOYLE,
U. S. Marshal.

By Wm. D. Downey,
Deputy.

Marshal's fees, \$2.36. [263]

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on Geo. D. Emery, by handing to and leaving a true and correct copy thereof with Miss Elva Perry, stenographer for Geo. D. Emery, personally, at Seattle, in said District, on the 2d day of April, A. D. 1914, in accordance with request of Attorneys for Defendants.

JOHN M. BOYLE,
U. S. Marshal.
By Wm. D. Downey,
Deputy.

Marshal's fees, \$2.06.

Copy of within Citation received and service acknowledged this —— day of April, 1914.

Attorney for Plaintiff.

[Endorsed]: No. 2508. In the District Court of the United States for the Western District of Washington, Northern Division. Charles J. Schleif, Plaintiff, vs. Puget Sound Traction, Light & Power Co., a Corporation, Defendant. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 3, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

[Endorsed]: No. 2407. United States Circuit Court of Appeals for the Ninth Circuit. Puget Sound Traction, Light & Power Company, a Corporation, Plaintiff in Error, vs. Charles J. Schleif, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Received and filed April 17, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the Circuit Court of Appeals of the United States
for the Ninth Circuit.*

No. —.

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,
Plaintiff in Error,
vs.

CHARLES J. SCHLEIF,
Defendant in Error.

Statement of Record to be Printed.

To the Clerk of the Above-named Court:

You will please cause to be printed the entire record in the above-entitled action, including the certificate of the Clerk of the District Court of the United States for the Western District of Washing-

ton thereto, this statement, the order of said District Clerk of said District Court to prepare and transmit to the above-named court the record on appeal and return to writ of error, and the entry of appearance for plaintiff in error.

A statement of the documents to be printed, which includes the entire record in said action, is as follows:

1. This Statement.
2. Complaint.
3. Answer.
4. Reply.
5. Verdict.
6. Judgment.
7. Petition for New Trial.
8. Order Overruling Petition for New Trial.
9. Stipulation for Extension of Time to File Bill of Exceptions,
10. Order Granting Extension of Time to File Bill of Exceptions.
11. Bill of Exceptions and Acknowledgment of Service Thereon.
12. Assignment of Errors.
13. Petition for Writ of Error.
14. Order Allowing Writ of Error.
15. Bond on Writ of Error.
16. Original Writ of Error.
17. Original Citation and Marshal's Return of Service Thereof.
18. Affidavit of E. A. La Fortune as to Service of Papers.
19. Praeceptum for Transcript of Record.

20. Order Relating to Exhibits.

21. Entry of Appearance for Plaintiff in Error.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Plaintiff in Error.

[Endorsed]: No. 2407. In the Circuit Court of Appeals of the United States for the Ninth Circuit. Puget Sound Traction, Light & Power Company, a Corporation, Plaintiff in Error, vs. Charles J. Schleif, Defendant in Error. Statement of Record to be Printed. Filed Apr. 14, 1914. F. D. Monckton, Clerk. Refiled Apr. 17, 1914. F. D. Monckton, Clerk.

*In the Circuit Court of Appeals of the United States
for the Ninth Circuit.*

No. —

PUGET SOUND TRACTION, LIGHT & POWER
COMPANY, a Corporation,

Plaintiff in Error,

vs.

CHARLES J. SCHLEIF,

Defendant in Error.

**Praeipe for Entry of Appearance [of Attorneys for
Plaintiff in Error].**

To the Clerk of the Above-named Court:

You will please enter our appearance as attorneys
for plaintiff in error in the above-entitled action.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Plaintiff in Error.

Office Address: 403 Electric Building, Seattle, Wash-
ington.

[Endorsed]: No. 2407. In the Circuit Court of
Appeals of the United States for the Ninth Circuit.
Puget Sound Traction, Light & Power Company, a
Corporation, Plaintiff in Error, vs. Charles J.
Schleif, Defendant in Error. Praeipe for Entry of
Appearance. Filed Apr. 14, 1914. F. D. Monckton,
Clerk. Refiled Apr. 17, 1914. F. D. Monckton,
Clerk.

No. 2407

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PUGET SOUND TRACTION,
LIGHT & POWER COMPANY, a
corporation,

Plaintiff in Error,

vs.

CHARLES J. SCHLEIF,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Plaintiff in Error.

Business and P. O. Address:

403 Electric Building,

Seattle, Washington.

Filed

No. 2407

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PUGET SOUND TRACTION,
LIGHT & POWER COMPANY, a
corporation,

Plaintiff in Error,

vs.

CHARLES J. SCHLEIF,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Plaintiff in Error.

Business and P. O. Address:

403 Electric Building,

Seattle, Washington.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PUGET SOUND TRACTION,
LIGHT & POWER COMPANY, a
corporation,

Plaintiff in Error,

vs.

CHARLES J. SCHLEIF,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

STATEMENT OF THE CASE

This was an action for personal injuries resulting to defendant in error while assisting in constructing a manhole on one of the public streets of the city of Seattle from being struck by one of the

street cars of plaintiff in error. Defendant in error was the plaintiff and plaintiff in error the defendant in the court below, and to save confusion the parties will be referred to hereafter as plaintiff and defendant instead of as defendant in error and plaintiff in error.

The complaint in substance alleges that on January 23, 1913, at about 10:00 o'clock A. M., while plaintiff was assisting in constructing a water gate or manhole in connection with an underground water pipe on 14th Avenue N. E. in the City of Seattle, near its intersection with 55th Street, in a circular excavation six feet in diameter and four feet deep, and while his attention was fixed upon his work of passing bricks to the mason constructing said manhole, defendant caused one of its electric street cars operated upon said 14th Avenue N. E., the track of which extended within one foot of said excavation, to run into and strike plaintiff, causing the injuries for which recovery was sought. The negligence which is alleged to have caused plaintiff's injuries is (1) failure to give plaintiff proper warning of the approach of the street car; and (2) the operation of said car at 15 miles per hour when the speed was limited by ordinance to 12 miles per hour. (Record, pp. 2-6).

Defendant's answer, while admitting that a city ordinance limited the speed of street cars to 12 miles per hour at the point of the accident, in substance denies that said collision was due to any

negligence on the part of defendant. As a first affirmative defense it is alleged that whatever injuries plaintiff received were caused and contributed to by his own careless acts and negligence. As a second affirmative defense it is alleged:

“That the plaintiff at the time and place in question was employed by a contractor of and with the City of Seattle in the performance of extra-hazardous work, to-wit, in the construction of a manhole in and upon one of the streets of said city, and that the work in which the plaintiff was engaged at the time and place in question was of the extra-hazardous kind covered and included under Chapter 74, Laws of 1911 of the State of Washington, page 345, relating to compensation of injured workmen; and that whatever injuries, if any, plaintiff received, were received at a time when he was engaged in the employment of an employer carrying on and conducting one of the industries scheduled and classified under such law, and at the plant of such employer, and subject to the provisions of such law; and that, thereafter, to-wit, on the 25th day of January, 1913, the plaintiff herein caused to be filed a Workman's Claim for Compensation with the Industrial Insurance Commission of the State of Washington being Claim No. 16,531; and thereafter, the said Industrial Insurance Commission of the State of Washington awarded the plaintiff herein compensation

for the month ending February 23, 1913, of \$30.00, and also for the month ending March 23, 1913, of \$30.00." (Record, pp. 7-10).

Plaintiff's reply puts in issue defendant's plea of contributory negligence and with respect to the second affirmative defense plaintiff admits that at the time of the accident he was employed by a contractor of the City of Seattle in the constructing of a manhole but denies that his injuries were inflicted "at the plant" of his employer or through the negligence of his employer and denies that his injuries were subject to compensation under the Workmen's Compensation Act and alleges that his injuries were inflicted by a person not in the same employment as himself and away from the plant of his employer, and that if they were subject to compensation under the act, plaintiff was entitled to elect and had elected not to take under the Act but to rely upon his action at law and had given due notice of said election. (Record, pp. 12-13).

The cause was tried before a jury on January 8, 1914. Upon plaintiff resting his case defendant moved for judgment of non-suit for the reasons: (1) that plaintiff had failed to establish any cause of action against defendant; (2) that plaintiff's evidence showed as a matter of law that he was guilty of contributory negligence; and (3) that under the evidence plaintiff could recover only under the Workmen's Compensation Act. This motion the court denied. (Record, pp. 143-145).

Defendant then submitted its evidence and after all the evidence was in defendant challenged the sufficiency of the evidence to sustain a verdict for plaintiff, basing its motion upon the same grounds as those for which he had moved for a non-suit. This motion was likewise denied. (Record, pp. 186-187).

On January 9, 1914, the jury returned a verdict for the plaintiff for \$1470.00. (Record, p. 14). Before the case was submitted to the jury defendant duly excepted to the giving of certain instructions and the refusal of the court to give certain instructions, which will be more fully considered later. On January 13, 1914, judgment on the verdict was entered. (Record, pp. 15-16). On January 29, 1914, defendant petitioned the court for a new trial (Record, pp. 17-28), which motion was on March 18, 1914, denied. (Record, p. 29). From the judgment entered upon the verdict this writ of error is prosecuted. (Record, pp. 225-226).

SPECIFICATIONS OF ERROR

I.

The court erred in denying defendant's motion for judgment of non-suit. (Record, pp. 143-145).

II.

The court erred in overruling defendant's challenge to the sufficiency of the evidence to sustain

a verdict for plaintiff and request that the court instruct the jury to return a verdict for defendant. (Record, pp. 186-187).

III.

The court erred in instructing the jury as follows:

“You are instructed that one of the defenses in this case is that the plaintiff was employed in extra-hazardous work, an employment which comes within the scope of the State Industrial Insurance Act, and that because of the provisions of that Act, he cannot recover in this case. I instruct you that under the evidence as it is presented before you in this case, that the act does not apply to the issue before you for consideration and that you will entirely disregard such defense on the part of the defendant and determine this case entirely upon the evidence which has been admitted as to the negligence on the part of the defendant, or contributory negligence on the part of the plaintiff, as outlined and defined in these instructions.” (Record, pp. 205-206).

IV.

The court erred in refusing to give the following instruction duly requested by defendant:

“You are further instructed that it was the duty of the plaintiff to use his senses, his eyes

and his ears, especially when working in or about a place where a collision with a car was likely to occur, in order to discover the proximity of a passing car of the defendant, and his failure so to do would constitute contributory negligence and prevent any recovery on his part. The law requires one working in or about a street car track to be on the lookout and to listen for approaching cars, and if you find in this case that the plaintiff failed to look and listen and that had he looked and listened he would have discovered the car, then his failure so to do would constitute contributory negligence and he cannot recover, and your verdict should be for the defendant.” (Record, p. 203).

V.

The court erred in instructing the jury as follows:

“You are instructed, however, that if by a fair preponderance of the evidence, you believe that the car was running more than twelve miles an hour at the place of the accident, the burden of proof would, by such act be shifted to the defendant to show by a fair preponderance of the evidence that the injury, if one was sustained, was the result of contributory negligence on the part of the plaintiff and that such negligence was the proximate cause of the injury and without which it would not have happened.” (Record, p. 206).

ARGUMENT

SPECIFICATIONS OF ERROR NOS. I AND II

Defendant Entitled to a Directed Verdict

An examination of the record will, we believe, convince the court that if the record reveals any negligence on the part of defendant, such negligence was not shown to be the proximate cause of plaintiff's injuries.

Except as otherwise indicated the following facts were uncontroverted: 14th Avenue N. E. at and near the point where it is intersected by 55th Street runs north and south. (Record, pp. 123-4). In the middle of the avenue at this point defendant, at the time of the accident, operated a double track electric street railway. (Record, p. 2). Northbound cars were operated upon the easterly (Record, pp. 60, 72) and southbound cars upon the westerly track. (Record, p. 72). At the time of the alleged accident the west side of the street between the curb and westerly track was completely paved with asphalt. (Record, pp. 56, 75-6, 123-4, 179-180). Between the easterly rail and the easterly curb the street was excavated for the concrete base a depth of about a foot (Record, p. 179) but the concrete and asphalt had not yet been laid. (Record, pp. 75-6, 116, 123-4, 179-180). At the time of the accident Krough and Jesson, city contractors, by whom

plaintiff had been employed for several months (Record, pp. 70-71) and was then employed (Record, pp. 70-1, 136-7), were constructing a water gate or manhole from the surface of the street to the water pipes of the city water system which were laid underground. (Record, pp. 54-5). For the purpose of constructing this manhole a circular excavation had been made in the unpaved portion of the street, about six feet in diameter (Record, pp. 55-6, 122-3, 183-4) and which at the time of the accident was about three feet deep. (Record, pp. 55-6, 117). This excavation was on the easterly side of the avenue near its intersection with 55th Street. The most westerly edge of the excavation was about two feet from the easterly rail of the street car track (Record, pp. 57-8, 127-8) and the north edge of the excavation was approximately on the south marginal line of where the south walk on 55th Street would be had it been extended from the easterly curb to the easterly rail of the street railway track. The center of this excavation was four feet, four and a half inches from the easterly rail of the street railway track. (Record, p. 183). The dirt from the excavation was thrown upon the southerly side of the hole. (Record, pp. 59-60). For the convenience of pedestrians crossing 14th Avenue N. E., on the southerly side of 55th Street, a temporary sidewalk had been constructed from the easterly curb to the easterly rail by laying short boards or planks side by side in a north and south direction (Record, p. 180)

from the easterly curb to the easterly rail of the east track. (Record, pp. 56-7, 76-78, 116-7). These short planks were not laid upon sleepers (Record, pp. 116, 181) but were laid directly upon the dirt where the street had been excavated preparatory to being paved. Where this temporary sidewalk passed the excavation for the manhole these short planks lapped over the hole or excavation a short distance (Record, pp. 56-7, 115-116, 180) and the evidence tended to show that the constant use of these planks and the fact that they were unsupported by sleepers had caused them to tend to teeter or tip if a person should stand on the ends of the planks next to the hole. (Record, p. 180).

The manhole was being constructed with brick and mortar. (Record, pp. 57-8). A Mr. Kroon was in the excavation constructing the manhole (Record, pp. 57-8, 113-4) and it was plaintiff's duty to wheel the brick in a wheel-barrow from the place where the bricks for this work were piled up on 55th Street east of 14th Avenue N. E., and dump them near the hole, and then hand the brick down to the mason constructing the manhole as he needed them. (Record, pp. 73-4, 137-8). The most natural place for the plaintiff to stand in handing these brick down to the mason was directly north of the center of the hole, standing on the temporary plank crosswalk. (Record, p. 140). Plaintiff never stood between the track and the excavation while handing brick to the mason. (Record, pp. 115-116). The brick were handed to the mason

on the same side of the track upon which they were dumped and there was no occasion for plaintiff to cross the track for material. (Record, pp. 140-1). Indeed the record fails to show that there was any necessity whatever for the plaintiff, in discharging his duties, either to cross the track, or to go sufficiently near the track to be struck by a passing car. (Record, pp. 73-4, 140-1).

The accident occurred at 10.20 in the forenoon. (Record, pp. 70-1). Plaintiff, a man of forty-two years (Record, p. 54) had wheeled a load of brick to the excavation for the manhole and was standing north of the center of the hole (Record, pp. 78, 119-120) and at a point where a car approaching from the south upon the easterly track could easily pass him (Record, pp. 119-120, 139-140, 171) and was about to hand brick which he had in his hand to the mason (Record, p 137) when he suddenly jumped upon the track when a car approaching from the south upon the easterly track (Record, p. 60) was not more than ten feet distant (Record, pp. 120-1, 124-5, 138-9, 170-1). The testimony introduced by both plaintiff and defendant tended to show that the reason plaintiff sprang upon the track was the fact that while he was in the act of handing the brick to the mason in the excavation one of the short pieces of plank or board forming the temporary crosswalk upon which he was standing flew up or teetered, and plaintiff, to save himself from falling into the excavation involuntarily sprang onto the track. (Record, pp.

78, 79, 137-8, 170-171). Although plaintiff himself testified that he was not accustomed to stand on the teetering ends of planks projecting over the hole to pass the brick down to the man, (Record, pp. 185-6), he admitted that this might have caused him to jump on the track. (Record, p. 79).

Since plaintiff was standing on the north side of the excavation, in handing the brick to the mason he must have been facing in a southerly direction. The car which injured him was approaching from the south down about a three per cent. grade (Record, pp. 126-7) and could have been seen by plaintiff had he looked for it at least six hundred feet. (Record, pp. 59-60, 126-7, 172-3). He testified, however, that he had not looked for a car from the time the car came in view until he was hit; that his mind was engrossed in his work; that he wasn't thinking about the car. (Record, p. 73). He did not hear the car approaching (Record, pp. 58-9) although there were no unusual noises to divert his attention. (Record, pp. 122-3, 173-4). He had been in the employ of Krough and Jesson between three and four months (Record, pp. 70-71) and had assisted in similar work on the same street, for a considerable time. (Record, pp. 71-2). During this time, plaintiff testified, cars had been operated quite frequently over that line. (Record, p. 72).

While the motorman of the car in question testified that prior to the accident the car was going about six or seven miles an hour and that he rang

his gong about 20 or 30 feet from where the workmen were working, (Record, pp. 170-1), there was other testimony which, for the purpose of this review, we will assume was sufficient to present a jury question, to the effect that the car was going as high as fifteen miles an hour and that the gong was not sounded until plaintiff jumped upon the track. As to the manner in which the accident occurred we quote the following from the record:

“Q. What misstep did you make; you stepped on the teetering board and that caused you to start to fall and you jumped on the track in front of the car just as the car came along. That is it, isn't it?

“A. Well, it might be it.”

(Testimony of Plaintiff, Record, p. 79).

“Q. He was handing brick to you down in the hole?

“A. Yes, sir.

“Q. About how far was he from the track when he was standing there?

“A. Oh, about three feet or something like that. He stand about in the center.

“Q. He was standing about three feet from the track so if he remained standing there the car would have gone by and not hit him?

“A. I guess so.

“Q. If he had not stepped on the track the car would not have hit him?

“A. No.

“Q. You heard the bell of the car ring?

“A. Yes.

“Q. And you saw him step on the track?

“A. He stepped on the track before I heard the bell.

“Q. Now, did you see what caused him to step on the track?

“A. What?

“Q. What did he do that caused him to fall over on the track; what did Schlieff do that caused him to fall over on the track?

“A. He stepped over on the track.

“Q. What caused him?

“A. He stepped on the end of the plank and the plank jumped—he jumped right up on the track, so he don’t fall in the hole.

* * * * *

“Q. When he stepped on the teetering board and jumped on the track you heard the bell?

“A. Yes.

“Q. And you looked and the car was right there?

“A. Yes.

“Well, then, within three or four feet of him?

“A. Yes, at the time when I saw the car he was not more than three or four feet ahead of the car.”

(Testimony of John Kroon on behalf of Plaintiff, Record, pp. 120-1).

Plaintiff's witness, Geo. Kumpf, did not see plaintiff step on the track, but first saw him on the track between five and ten feet ahead of the car. (Record, pp. 124-5). Other witnesses testified:

“Q. Did he still have brick within reach to pass down?

“A. The brick was laying right outside of the hole there. There was a plank laying across the edge of the hole for the men to step on so he could hand down the brick and mortar and he had to step off of that plank to take the brick and he was in the act—he had the brick in his hands and was going to turn around and hand them down in the hole as near as I could see, and he lifted his right foot up there to step on that plank there and somehow or other he made a misstep and involuntarily he stepped out on the track; stepped right over in front of the track—I was standing on the sidewalk right there and as he stepped over there I glanced down the track and there was the car within probably 12 feet.

* * * * *

“Q. And the fender projects three or four feet in front of the car?

“A. Yes, sir.

“Q. That must have been within four to six feet of him?

“A. Yes, sir.

(Testimony of plaintiff's witness, Mr. Krogh, Record, pp. 137-8).

“Q. Now, Mr. Nelson, you were there in charge of the car. Tell the jury how this accident happened.

“A. Well, I was going down 14th Avenue Northeast and I was going about—I was going about 6 or 7 miles an hour and I rang my going about 20 or 30 feet from where these workmen were working and as I got about 5 feet from this manhole, this man stepped on a loose plank and fell or maybe jumped, like he was trying to get out of my way and fell right on the middle of the track.

“Q. If he had remained where he was, would your car have gone past without hitting him?

“A. Yes, sir.

(Testimony of the motorman, Record, p. 171).

This is all the testimony in the record as to how the accident happened, and we submit that it was insufficient to sustain a recovery against the defendant for the following reasons:

(1) The evidence failed to show that the speed of the car was the proximate cause of plaintiff's injury;

(2) Assuming that plaintiff's act in jumping in front of the car was involuntary, the failure of the motorman to sound the gong would not have avoided the accident; and

(3) Assuming that plaintiff deliberately jumped in front of the car, from a place of safety, he was guilty of such contributory negligence as to bar his recovery.

Speed of Car Not Proximate Cause of Accident.

While it was admitted by the pleadings that an ordinance limited the speed of cars at the point in question to twelve miles per hour, there was absolutely no evidence in the record that a car going at twelve miles an hour or even less could have been stopped within ten feet, the distance of the car when plaintiff jumped in front of it, nor was it shown that had the car been going at a more modest speed plaintiff would have had time to leave the track in safety. Under these circumstances we submit that the evidence failed to show the speed of the car to have been the proximate cause of the accident.

Of course it is elementary that before a person can recover damages by reason of the negligent act of another it must be established that such negligent act was the proximate cause of the in-

juries sustained. In other words, that had defendant not been negligent the accident would not have occurred.

“Liability does not rest in the negligent act but upon proof that the act of negligence was the proximate cause of the injury.”

Wilke v. Logging & Timber Co., 55 Wash. 324.

The mere fact that a street car is running in excess of the rate permitted by ordinance will not entitle an injured party to go to the jury on the question of negligence, when there is no evidence showing that the motorman could have avoided the injury if the speed had been within the permitted rate.

Molyneux v. Ry. Co., 81 Mo. App. 25;

Detmers v. R. Co., 48 N. Y. S. 23;

Hoffman v. Ry. Co., 63 N. Y. S. 442;

Holdredge v. Mendenhall, 108 Wis. 1, 83 N. W. 1109;

Hirschman v. R. Co., 61 N. Y. S. 304;

Callery v. Transit Co., 185 Pa. St. 176, 39 Atl. 813;

Hunter v. Traction Co., 193 Pa. St. 557, 44 Atl. 578;

Miller v. R. Co., 114 La. 409, 38 So. 401;

Louisville Ry. Co. v. Gaar, (Ky.) 112 S. W. 1130;

McCann v. R. Co., 3 N. Y. S. 418;

Schmidt v. Transit Co., 140 Mo. App. 182, 120 S. W. 96;

Foreman v. Norfolk, etc., Co., 106 Va. 770, 56 S. E. 805.

In *Schmidt v. Transit Co.*, 140 Mo. App. 182, 120 S. W. 96, the court said:

“It is argued the court should have instructed a verdict for the defendant, for the reason there was no evidence tending to show that the excessive speed of the car was the proximate cause of the collision and resulted in the injury to plaintiff. It is very true that the mere fact a street car is run at a greater rate of speed than is allowed by the ordinance will not authorize a recovery, unless there is some evidence connecting a violation of the ordinance with the injury complained of. That is to say, the mere fact of excessive speed, without more, is not sufficient to support an action. A right of action, therefore, accrues to a person only when it appears that such excessive speed operates proximately to his injury. Therefore, in order to support the action, it should appear that the injury would not have occurred if the car were running at a speed within the ordinance limit. There is no presumption of law

that, because the car was running in violation of the ordinance, the plaintiff's injury resulted proximately therefrom. On the contrary, such is a matter of fact, which must be established to a reasonable certainty by the evidence. *Bluedorn v. Mo. Pac. Ry. Co.*, 121 Mo. 258, 25 S. W. 943; *Kelly v. Han. & St. J. Ry. Co.*, 75 Mo. 138; *Jackson v. Ry. Co.*, 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650; *Molyneux v. S. W. Mo. Elec. Ry. Co.*, 81 Mo. App. 25."

The case of *Thompson v. R. Co.*, 152 Ind. 461, 53 N. E. 462, is in point. There it appeared that plaintiff was employed by a street railway company to turn switches at the intersection of several lines, and there was room for him to stand safely between the tracks. Having turned the switch a car passed him immediately followed by another drawn by horses which were prancing about, and to avoid injury therefrom the plaintiff stepped back toward the other track and was struck by a car thereon moving in an opposite direction at eight or ten miles an hour, contrary to an ordinance limiting the speed to six miles an hour. Upon this state of facts it was held that it was the appearance of the horses and not the speed of the car that was the proximate cause of the accident. In so holding the court said:

"It is evident, we think, that the proximate cause of the accident and injury to the appellant was the threatening appearance of the horses drawing the car on the south track. His alarm

from this circumstance led him to step backward towards the north track, and too near it for his safety. The conditions affecting his security at that place were just such as they had been during the whole period of his employment. In a moment of confusion and excitement he miscalculated the space occupied by moving cars on the north track, and he was struck by the front part of a trailer car. Had it not been for the presence, the fright, and the plunging of the horses, no accident would have occurred. *Kistner v. City of Indianapolis*, 100 Ind. 210; *Pennsylvania Co. v. Congden*, 134 Ind. 226, 33 N. E. 795. See note to *Gilson v. Canal Co.* (Vt.) 36 Am. St. Rep. 807, 861 (s. c. 26 Atl. 70); *O'Neal v. Railway Co.*, 132 Ind. 110, 31 N. E. 669. The danger of such an occurrence was one of the risks of the employment, and was assumed by the appellant. *Id.*; *Pennsylvania Co. v. O'Shaughnessy*, 122 Ind. 558, 23 N. E. 675."

* * * * *

"If it were assumed by us, without proof, that the appellee, the Citizen's Street-Railroad Company, was in existence in 1864, when the ordinance was adopted, and that it was one of the 'certain passenger railways' referred to in the ordinance, and subject to its provisions, the fact that the trailer car was moving at a greater rate of speed than 6 miles per hour at the time of the accident would not sustain the

appellant's case. No casual connection is shown between the speed of the car which struck the appellant and the injury. *Had the car been moving at the rate of 6 miles per hour, instead of 8 or 10, and had appellant stepped backward as he did, at the instant he did, to get out of the way of the horses, he would have been struck by the passing car, not because of its rate of speed, but on account of his position near the track."*

The only difference between the case at bar and the case last cited is that in the present case plaintiff involuntarily stepped upon the track by reason of the teetering of the board on which he was standing while in the *Thompson case* he involuntarily, or in a moment of confusion, stepped upon the track by reason of the prancing of the horses of a car passing upon a parallel track.

The speed of the car, we submit, was not the proximate cause of the plaintiff's injuries.

Failure to Sound Gong Not the Proximate Cause of Accident

The burden was upon the plaintiff to establish negligence on the part of defendant. It was not shown that any of the people working at the point where plaintiff was injured had any occasion to cross, stand upon, or get dangerously near the track. On the other hand it affirmatively appears that plaintiff did not have to cross the track for material.

(Record, pp. 140-1). It is undisputed that as the car approached the place where plaintiff was working neither the mason in the excavation nor plaintiff were dangerously near the track. Plaintiff was standing on the north side of the hole and therefore, in handing brick to the mason in the hole, *must have been facing the car which was approaching from the south*. We submit that under such circumstances the motorman of the approaching car was not called upon, as a reasonably prudent man, to anticipate that plaintiff, without glancing up the track, would suddenly jump upon the track immediately in front of the car.

There is no obligation resting upon a motorman to sound the gong unless some extraordinary exigency requires it.

Theobald v. Transit Co., 191 Mo. 395, 90 S. W. 354;

Perry v. St. R. Co., 101 Ga. 400, 29 S. E. 304;

Miller v. Traction Co., 198 Pa. St. 659, 48 Atl. 864.

In *Eddy v. Ry. Co.*, 98 Ia. 626, 67 N. W. 676, the Court said:

“We incline to think he (the motorman) was not chargeable with negligence in assuming that a laborer on the street, who was not so near to the track as to be in danger of being

struck by the car, would require a signal to keep him from putting himself in a place of danger."

Moreover, the evidence is conclusive that plaintiff's act in jumping upon the track in front of the approaching car was involuntary, resulting from his stepping upon a teetering plank. This being true, he would have jumped just the same had the gong been sounded, and had he known that the car was approaching. It was the slipping of the plank, then, and not the failure of the motorman to sound the gong that was the proximate cause of plaintiff's injuries.

In the case of *Foreman v. Norfolk etc. Co.*, 106 Va. 770, 56 S. E. 805, 806, the court said:

"If it be conceded that the car which struck the plaintiff was being operated at an unusual rate of speed and without sounding its gong, it is manifest from the uncontradicted evidence in the case, including the admissions of the plaintiff, that this was not the proximate cause of the accident. *Atlantic & D. R. Co. v. Reiger*, 85 Va. 418, 28 S. E. 590.

"The time limit prescribed by the ordinance of Portsmouth was six miles per hour. *The plaintiff says he stepped in front of the car when it was within four or five feet of him. The evidence shows that a car running at the rate of six miles an hour could not be stopped in less than 14½ feet. It is clear, therefore,*

that the plaintiff could not have been saved if the car had been running at the rate prescribed by the ordinance, nor could the sounding of the gong under such circumstances have altered the inevitable result of the plaintiff's act."

On the other hand—

If plaintiff stepped on the track voluntarily he was guilty of contributory negligence.

Plaintiff was in a place of safety until the car was within ten feet of him. The car had been visible to plaintiff for at least three blocks. He knew that cars passed frequently upon these tracks. It was broad daylight. His work of tending the mason in the manhole was the very simplest and could not have so diverted his attention that he could not have glanced in the direction from which the car was approaching before stepping upon the track. In performing his work he was facing the approaching car and had but to raise his eyes to get a sweeping view of the track for three blocks. If, therefore, plaintiff's act in stepping upon the track was a voluntary act he was clearly guilty of contributory negligence barring his recovery in this action.

The case of *Kiely v. The Seattle Electric Company*, 139 Pac. 197, 36 Wash. Decisions (Advance Sheets) 347, is squarely in point. In that case it appeared that the manhole was between the two parallel tracks and the plaintiff and another man were dragging the sewer, one man being down in the manhole and the plaintiff standing at the sur-

face of the street talking to him. The plaintiff was standing in a place of danger and jumped just before the car struck him, but instead of jumping off the track, he jumped directly in front of the car and was struck. The Supreme Court reversed the lower court in permitting the case to be submitted to the jury, holding that the plaintiff was guilty of such contributory negligence as to bar his recovery and therefore directed that the cause be dismissed. We quote the following from the court's opinion:

“The evidence shows that shortly before he was struck, respondent was leaning over the southerly manhole talking to Shrewbury, who was about to come to the surface for the purpose of obtaining a piece of timber needed in his work. The evidence further shows, that 15th avenue west extended in a northerly and southerly direction; that the car which struck respondent was traveling south; that, when approaching, it could be seen for a distance of almost half a mile before it reached the point where respondent was injured; that the street was clear from obstructions, further than the mere suggestion of another car that had just passed in an opposite direction; that Shrewbury and respondent had removed the coverings from the manholes, and had placed a flag at each of them as a warning; that the manholes were about three hundred feet apart; that respondent was near the southerly man-

hole, and that no one other than persons on the car observed him until just about the moment he was struck. The evidence of a number of passengers produced by appellant, and other witnesses produced by respondent, was that, a repeating gong upon the car was sounded and continued ringing for a distance of from 75 to 200 feet before it reached respondent. The evidence upon this point, which is without practical dispute, is so overwhelming that it disposes of any contention of negligence by reason of appellant's failure to give a warning of the approaching car. Evidence as to the speed was conflicting; some witnesses testifying that the car was running as rapidly as 25 miles per hour, while others testified that it was not running to exceed six or eight miles per hour."

* * * * *

"The speed of the car was doubtless a question for the jury, and upon this issue it is possible they might have been justified in finding that it was running at an excessive and dangerous rate."

* * * * *

"The principal questions in this case are, (1) whether respondent was guilty of contributory negligence; and (2) whether the doctrine of last clear chance can be applied. Respondent had been engaged in the same work for the city for a number of years, and had

been working in this identical locality for about two weeks. The accident occurred in daylight. The street was straight, with a slight descending grade towards the south, and the south-bound car which struck respondent, when approaching, could have been seen for at least half a mile. There was nothing upon the street to distract respondent, to confuse him, or to divert his attention; nor was there any evidence that he was deficient in any natural sense, such as sight or hearing. Although he was rightfully upon the street engaged in his usual work, it is difficult to understand how, in the exercise of ordinary care and prudence, he could have failed to see or hear the approaching car. As a witness in his own behalf, he seemed unable to give any intelligent account of how the accident happened. The evidence of other witnesses indicates that he was paying no attention to the approaching car. If he was conscious of its approach, he certainly exercised no care in stepping from the zone of danger; an act which would have required but an instant of time. Two, or at most three, ordinary steps would have placed him in a position of safety. Under these facts, we fail to see how the respondent is to be relieved from the charge of contributory negligence."

* * * * *

"Although respondent was rightfully in the street, it was his duty to exercise reasonable

care to learn of the approach of cars; a turn of the head and a glance of the eye would have been sufficient, especially when a signal was given by the ringing of a repeating gong. *The manhole at which respondent was standing was between appellant's east and west tracks. Respondent was required to take only one or two steps towards the easterly track upon which no car was approaching; an act requiring but an instant of time. It is impossible to see how he could have failed to remove himself from the zone of danger in the face of the approaching car, even though it was running at an excessive speed, without being guilty of contributory negligence as a matter of law.* Although the facts involved may not be entirely similar, the rule announced in *Duteau v. Seattle Elec. Co.*, 45 Wash. 418, 88 Pac. 755; *Skinner v. Tacoma R. & Power Co.*, 46 Wash. 122, 89 Pac. 488; *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458, and *Fluhart v. Seattle Elec. Co.*, 65 Wash. 291, 118 Pac. 51, is controlling here. Other cases in point are *Hafner v. St. Paul City R. Co.*, 73 Minn. 252, 75 N. W. 1048; *Lyons v. Bay Cities Consol. R. Co.*, 115 Mich. 114, 73 N. W. 139; *Quinn v. Boston Elev. R. Co.*, 188 Mass. 473, 74 N. E. 687. In each of these cases the injured party was working in the street where the car was running, in some instances being employed by the city."

In the *Kiely case* there was evidence that the car was going twenty-five miles an hour. The plaintiff in that case was standing over a manhole between the two tracks, and was in a place of danger as the car approached him. In the present case there was no evidence that the car was going in excess of fifteen miles an hour, and it affirmatively appeared that plaintiff was beyond the sphere of danger as the car approached him, and that he would not have been struck had he not jumped directly in front of the car when it was not to exceed ten feet from him.

The decisions of other courts are to the same effect. Thus in *Clancy v. Transit Co.*, 192 Mo. 615, 91 S. W. 509, a laborer, who was at work on a street between double tracks and while standing in a ditch dug for gas pipes, was struck by a street car, was held guilty of contributory negligence as a matter of law.

In *Brockschmidt v. R. Co.*, 205 Mo. 435, 103 S. W. 964, it was held that a laborer who, knowing that cars frequently passed along tracks of a street railway, took a position in the path of the cars with his back to those which would approach him, for the purpose of removing dirt from the tracks, and remained there without care for approaching cars until he was struck and killed, was held to have been guilty of contributory negligence barring a recovery, although no gong was sounded.

In *Hafner v. St. Paul City R. Co.*, 73 Minn. 252, 75 N. W. 1048, it appeared that plaintiff, who had been engaged for three days in grading a street, had gone to a pile of plank to get one to assist in getting a load of sand up an abrupt ascent. He looked for a car when at the pile, which was 48 feet from the place where the plank was to be used. Seeing none approaching, he went to the place where the plank was to be used and stooped to adjust the plank without looking to see if a car was near, thereby throwing his head into a position where it was struck by a passing car. It was held that he was guilty of contributory negligence barring a recovery.

In *Davies v. Peoples R. Co.*, 159 Mo. 1, 59 S. W. 982, a person unloading iron beams from a wagon standing in a street at a sufficient distance to allow cars to pass, who was compelled to go within range of cars to unload, was held guilty of contributory negligence where he had moved for other cars, and while standing with his back to an approaching car which he had not seen, was struck and injured.

In *Volosko v. Interurban St. R. Co.*, 190 N. Y. 206, 82 N. E. 1090, plaintiff was held guilty of contributory negligence where he was unloading blocks of marble from a wagon standing so that the hub was five or six inches from the track, which he knew was there, and a view of which was unobstructed for 300 feet, and he looked in neither

direction before stepping on the hub of the wagon, where he worked five or ten minutes before being struck.

In *Lyons v. R. Co.*, 115 Mich. 114, 73 N. W. 139, a city laborer sweeping between the rails, who was so deaf that he could not hear the gong or sound of the car, but knew that cars were passing every few minutes, was held guilty of contributory negligence in failing to look, where the car striking him was in sight for a considerable distance. It was further held that his deafness required the exercise of greater diligence on his part to use his sight.

The case of *Quinn v. Boston Elevated R. Co.*, 188 Mass. 473, 74 N. E. 681, was quoted with approval in the case of *Hellieson v. S. E. Co.*, 56 Wash. 278. There the plaintiff was held not to have exercised due care where, while engaged in repairing a bridge between a sidewalk and the outer rail of the defendant's road, when near the track marking a plank, he was struck in the face by a car which he might have seen if he had looked.

In *Eddy v. Cedar Rapids & M. City R. Co.*, 98 Iowa 626, 67 N. W. 676, the plaintiff, who was in the employ of the city repairing walks along the side of defendant's tracks, had placed a plank over cross pieces to ascertain if they were properly placed, and while leaning over examining them, was injured through jumping just before the collision by a car from the rear striking the end of the plank. He knew that cars were passing at

short intervals. Recovery was held to be barred by his contributory negligence, though the motor-man gave no signal of the car's approach.

In *Kelly v. Elevated R. Co.*, 197 Mass. 420, 83 N. E. 865, it was held that one whose work in a street did not bring him within striking distance of passing cars, and who nevertheless, at a place where the track was straight and the view unobstructed for over 250 feet, without thinking of the car, went near enough to be hit while his back was turned, did not exercise due care for his safety so as to entitle him to recover for a resulting injury.

In *Stenzhorn v. City Elec. Ry. Co.*, 159 Mich. 82, 123 N. W. 621, it was held that where, notwithstanding the noise in the street from passing vehicles, etc., plaintiff, a street sweeper, worked on the track of a street railway in such a position that he could not see cars approaching from the rear, and relied solely on his sense of hearing for safety, he was guilty of negligence precluding a recovery for injuries sustained in a collision with a car approaching from that direction.

In *Manetta v. United Traction Co.*, 174 Fed. 207, it was held that the plaintiff who was in charge of street work was guilty of contributory negligence as a matter of law, in standing upon street car tracks, at a corner where the track turned, for from 15 to 25 minutes with his back toward the point from which the car approached which struck him, without looking around.

In *Harlan v. Street Ry. Co.*, 157 Mo. App. 623, 138 S. W. 677, it was held that a street sweeper who started to cross the street car track in the course of his work; without looking for a car, and having stepped directly in front of one was guilty of such contributory negligence as to bar recovery for his death, even though the duty was imposed upon the street car company to furnish a watchman at the point in question and "notwithstanding the watchman may have been amiss in his duty to warn deceased of the approach of the car, and the gripman alike amiss in not giving the danger signal."

The evidence, we submit, fails to show that defendant was guilty of any actionable negligence, since, whatever, the speed of the car, it was not the proximate cause of the accident, and it was neither shown that the motorman owed the duty to plaintiff of sounding the gong as the car approached the manhole, nor that the failure to sound the gong was the proximate cause of the accident. On the other hand, the evidence affirmatively shows that if plaintiff voluntarily sprang upon the track in front of the car he was guilty of such contributory negligence as to bar his recovery. Whether plaintiff's act in jumping on the track was voluntary or involuntary, it follows that the court erred in refusing to direct a verdict in favor of defendant.

*Plaintiff Can Recover Only Under Workingmen's
Compensation Act*

Section 1 of the Workingmen's Compensation Act declares that *all phases* of injuries to workmen engaged in hazardous work are withdrawn from private controversy to the exclusion of every other remedy, proceeding or compensation regardless of questions of fault and that all civil actions and causes of action for such personal injuries are abolished except as in the act provided.

Rem. & Bal. Code, Supp. 1913, Sec. 6604-1.

Section 2 includes water works within the term "extra hazardous" employments as used in the Act.

Rem. & Bal. Code, Supp. 1913, Sec. 6604-2.
Section 3 provides:

"Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 6604-4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer: Provided, however, That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death re-

sult from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund."

Rem. & Bal. Code, Supp. 1913, Sec. 6604-3. Section 5 provides:

"Each workman who shall be injured whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and, except as in this act otherwise provided, *such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.*"

Rem. & Bal. Code, Supp. 1913, Sec. 6604-5.

It is apparent from the portions of the Workmen's Compensation Act above quoted that this Act contemplates that where an employee is injured at the plant of the employer when engaged in one of the employments enumerated as extra hazardous, whether through the negligence of his employer or a third person, the injured employee had no right to elect but could recover only under the Com-

pensation Act, and whatsoever right of action he had against a third person causing his injury would be assigned to the state by operation of law.

The record shows beyond question that plaintiff at the time of his injury was working in connection with the water works owned and operated by the City of Seattle. Paragraph II of the complaint alleges that the excavation in connection with which plaintiff was working at the time of his injuries was "made by the city for the purpose of constructing therein a water gate in connection with the underground water pipe then forming a part of its water system." (Record, p. 2). Paragraph III alleges that the plaintiff was then in the employ of contractors of the city and was engaged in assisting in the building of a manhole. (Record, p. 3).

Defendant's answer alleges as a second affirmative defense that the plaintiff at the time of his injuries was employed by a contractor of the City of Seattle in the performance of extra hazardous work, namely the construction of a manhole within the terms of the Workmen's Compensation Act. (Record, pp. 9-10). This portion of the answer was put in issue by the reply. (Record, p. 13).

As bearing upon the question of the character of work performed by plaintiff at the time of his injuries, we wish to call attention to the testimony of some of the witnesses. Plaintiff testified that at the time of his injury he was working for Krogh and Jesson, whose general business was "contract-

ing, street work;" (Record, p. 54) that at the time of his injury he was assisting in putting an air shaft or manhole which was a part and parcel of the city water works and was connected with one of the city water mains. (Record, p. 71).

Mr. Krogh of Krogh and Jesson, a firm of contractors for whom plaintiff was working at the time of his injury, testified that this firm was working under a contract from the city and that plaintiff was in their employ and on their payroll. (Record, p. 136).

It is conceded then that plaintiff at the time of his injury was engaged in assisting in the construction of a manhole which was a part and parcel of and a physical connection with the water pipes forming a part of the waterworks system of the city of Seattle. Was plaintiff at the time of his injuries working at the "plant" of his employer? We submit that he was.

A-"plant" is defined by Funk & Wagnalls New Standard Dictionary as follows: "A set of machines, tools, etc., necessary to conduct a mechanical business: often including the buildings and grounds, or, in case of a railroad, the rolling-stock, but not including material or product; hence the permanent appliances needed for any institution, as a post-office, a college, etc."

The Century Dictionary defines the word "plant" as, "the fixtures, machinery, tools, apparatus, ap-

pliances, etc., necessary to carry on any trade or mechanical business or any mechanical operation or process.”

In *Yarmouth v. France*, 19 Q. B. D. 647, at page 658, Justice Lindley says that the word plant in its ordinary sense “includes whatever apparatus is used by a business man in carrying on his business * * * all goods and chattels fixed or movable, alive or dead, which he keeps for permanent employment in his business.”

In the case of *Sloss-Sheffield Steel & Iron Co. v. Mobley*, 193 Ala. 425, 36 So. 181, 184, the court said:

“The doctrine of general acceptance in other jurisdictions is that the statute term ‘plant’ comprises whatever apparatus, fixtures, or tools a master uses in his business. Dresser’s Employers’ Liability, Sec. 48. Thus it had been adjudged in England and Scotland that a horse used in the business of the master is ‘plant’ and that viciousness of disposition is a ‘defect in the condition’ of such plant. In the English case the court said: ‘“Plant,” in its ordinary sense, includes whatever apparatus is used by a business man for carrying on his business; not his stock in trade, which he buys or makes for sale, but all goods or chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business.’ *Yarmouth v. France*, 19 Q. B. Div. 647; s. c. Eng. Ruling

Cas. 217; *Houston v. Edinburg St. Tramways Co.*, 14 Rettie, Ct. Sess. Cas. 621. The Supreme Court of Georgia defines 'plant' as meaning fixtures and tools necessary to carry on any trade or mechanical business. *Liberty County L. & L. Co. v. Barnes*, 77 Ga. 748, 1 S. E. 378. 'Small tools and appliances,' says Mr. Dresser, 'are included within its meaning,' instancing ladders, and citing *Weblin v. Ballard*, 13 Q. B. Div. 122, and *Cripps v. Judge*, 13 Q. B. Div. 583."

The Employers' Liability Act of Indiana provides that every railroad or other corporation shall be liable for damages for personal injuries suffered by any employee while in its services when such injury is suffered by reason of any defect in the condition of the ways, works, *plant*, tools, and machinery connected with or in use in the business of such corporation. The supreme court of that state in an action in which an employee of the telephone company was injured by the breaking of a telephone pole said:

"Probably a telegraph pole in such a case may properly be regarded as coming within the meaning of the word 'plant' in the first clause of the statute."

Cleveland, C., C. & St. L. Ry. Co. v. Scott,
29 Ind. A. 519, 64 N. E. 896.

In the case of *Brennan v. Sewerage and Water Board*, 108 La. 569, 32 So. 563, 568, it appeared

that certain taxpayers sought an injunction to prohibit the consummation of a contract entered into between the defendant and a New Orleans sewer company whereby the defendant had undertaken to acquire for the city certain tangible property and franchises of which the company claimed to be the owner acting under an amendment to the constitution authorizing defendant to use the proceeds of a certain tax in acquiring "the plant and franchises of any water or sewerage companies in the city of New Orleans." The court held that under this provision of the constitution the defendant would have a right to acquire some thousands of feet of constructed sewer not in connection with any machinery or other apparatus, and in so holding said:

"It is said that the language of the amendment does not apply to the property of the sewer company, because that property does not constitute a 'plant,' but consists, mainly, of some thousands of feet of constructed sewers not yet connected with any machinery or other apparatus; and we are referred to certain testimony to the effect that the pumping station, with the machinery, pumps, etc., of the waterworks company, are the 'plant' of that company. The conclusion to be drawn from this argument and illustration is that if the building, machinery, pumps, etc., thus referred to should be burned, or otherwise destroyed, the waterworks company would be without a 'plant,'

or other property, that the sewerage and water board would be authorized to buy. We do not concur in this view, and we should, probably, be doing injustice to the witnesses by so interpreting their testimony. A building to which engines and pumps are established for the distribution of water, but from which are no pipes or conduits leading, may be called a waterworks plant, and a system of pipes intended for the distribution of water, but with no provision by which that distribution can be made, may, with equal propriety be so called; and in neither case would the misnomer be more serious than if we should call an animal, otherwise a horse, by that name, though he should come into the world with but two legs, or should lose all of his legs after his arrival."

Plaintiff was injured in connection with one of the extra hazardous employments contemplated by the Workmen's Compensation Act, namely work connected with the construction of waterworks, and was injured in the course of his employment at the plant of his employer. Such being the case he could look only to the Employer's Compensation Act for compensation for his injuries and was not entitled to recover in this action.

We are aware that this court in the case of *Meese v. R. Co.*, 211 Fed. 254, held that the Washington Workmen's Compensation Act did not deprive the widow and children from recovering for

the wrongful death of an injured workman caused by the negligence of a third party, but that case was decided upon the theory that neither the title nor the body of the act was broad enough to repeal, either expressly or by implication, Remington & Ballinger's Code, §§ 183, 194, creating an action for wrongful death. Your Honors held in that case that since the act expressly repealed certain specific acts, it must be presumed that it was not intended to repeal others not specified such as the statute allowing recovery for wrongful death.

While this might be true as to a right of action given by a statute which was not expressly repealed by the Workmen's Compensation Act, the reasoning does not apply to actions for personal injuries to a workman injured by the act of a third person, since his right of recovery existed at common law and Section 1 expressly abolishes the common law right of action to workmen injured in extra hazardous work. There is no limitation in either the title or in the act as to the *manner* of the injury, whether by the act of the employer or the act of a third person. The act clearly contemplates that it was intended that an employee should be entitled to recover for any injury he sustained in the course of his employment at the plant whoever was responsible for such injury.

In the recent case of *Wendt v. Industrial Insurance Commission*, 38 Washington De-

cisions 94 (Advance Sheets), 141 Pacif., the Supreme Court of the State of Washington held that where a carpenter while in the course of his employment was killed while turning on an electric current for the purpose of putting in motion a power driven grind stone, his widow and children were entitled to recover under the Workmen's Compensation Act, even though it appeared that the workman was killed as a result of the act of a person other than his employer, which resulted in an electric current of high voltage passing through his body. In so holding, the Court said:

"It being shown that the deceased, at the time of his injury, was employed in a 'workshop where machinery is used;' that the workshop was a place 'wherein power-driven machinery is employed and manual labor is exercised * * * over which place the employer of the person working therein has the right of access or control,' and that he was injured 'upon the premises,' it seems to us there is no escape from the conclusion that his injury is within the purview of the act."

There are many employments that are hazardous more by reason of likely injury at the hands of persons other than the employer than from the acts of the employer himself. Where a lineman working for a telephone company is injured by wires of his employer being negligently caused to come in contact with a high tension wire of other com-

panies through the act of a third party, it can hardly be said that it was not the intent of the Compensation Act that such injured workman would be entitled to compensation under the act. Where a trainman is injured by the wrongful act of a third party in placing an obstruction upon the track, could it for a moment be suggested that it was the intention of the Compensation Act that such trainman should not be compensated for his injuries? If the title of the act is broad enough to allow a recovery by a workman injured by the act of a person other than his employer, it is clearly broad enough to take away from the injured workman the right to recover from such third party for his injury. An examination of the title and body of the act shows, we contend, that the test as to the right of recovery is not, who or what, caused the injury, but the test is rather, was the workman at the time of his injury engaged in the employment of his employer. We respectfully submit that plaintiff is not entitled to recover against defendant in this action.

SPECIFICATION OF ERROR NO. III

The court instructed the jury as follows:

“You are instructed that one of the defenses in this case is that the plaintiff was employed in extra-hazardous work, an employment which comes within the scope of the State Industrial

Insurance Act, and that because of the provisions of that Act, he cannot recover in this case. You are instructed that under the evidence as it is presented before you in this case, that the Act does not apply to the issue before you for consideration, and that you will entirely disregard such defense on the part of the defendant, and determine this case entirely upon the evidence which has been admitted as to the negligence on the part of the defendant or the contributory negligence on the part of the plaintiff as outlined and defined in these instructions.” (Record, pp. 205-6).

In giving the above instruction we respectfully submit the court erred. In discussing Specifications of Error, One and Two, (pp. 37 to 47 *ante*), we have shown that if at the time of his injury plaintiff was working “at the plant” of his employer, he could recover only under the Workingmen’s Compensation Act, and had no right of action against defendant. If, on the other hand, plaintiff’s injury occurred away from the plant of his employer his rights against defendant are controlled by the following provision of the act:

“If the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect

whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund."

Laws of Washington, of 1911, p. 348, Sec. 3; Rem. & Bal. Code, Sec. 6604-3.

Upon the issue as to whether or not plaintiff had, prior to the beginning of this suit, elected to take under the Compensation Act, the evidence was, in substance, as follows:

The accident in question occurred January 23, 1913. (Record, pp. 2, 54). On January 25, 1913, plaintiff presented his claim to the State under the Workingmen's Compensation Act over his own signature. (Record, pp. 78-79). And as a result of said claim being presented two state warrants for \$30 each were delivered to plaintiff and at the time of the trial (January 9, 1914, Record, p. 14) nearly a year after the claim was presented by plaintiff, these warrants had not yet been returned by the plaintiff to the Industrial Insurance Commission (Record, pp. 79-80) although the Commission had requested him so to do. (Record, p. 85).

This evidence, we submit, if it did not conclusively establish that plaintiff had elected to take under the Workingmen's Compensation Act, was at least sufficient to present a jury question as to whether or not he had made such an election.

The case is in every way analogous to the customary contract whereby an employee agrees, on becoming a member of his employer's relief association, that the acceptance of relief therefrom, on being injured, shall bar his right of action against his employer for the injury. Where such private agreements are made it is uniformly held:

“The acceptance of benefits under such a contract bars an action for damages.”

26 Cyc. 1096, and cases cited.

In other words, the acceptance of benefits constitutes the election as to which remedy the injured party wishes to pursue.

Did plaintiff accept any “benefits” under the Compensation Act? This depends upon whether the warrants sent to, and received by, plaintiff from the State as a result of the claim presented by him, constituted a payment by the State to plaintiff of the amounts represented by said warrants. This, we submit, was clearly a question for the jury. The fact that plaintiff kept these warrants for nearly a year after receiving them was sufficient evidence to support a finding that they were to be treated as payment.

The following excerpt from the case of *Western Pac. Land Co. v. Wilson*, 19 Cal. App. 328, 125 Pac. 1076, 1078, is in point:

“This instruction in effect directed the jury to disregard all evidence concerning the check.

But it was the giving of this check by defendant, and its subsequent retention by plaintiff, that defendant claimed amounted to a payment. The court determined, as a matter of law, that the giving and retention of the check, under the circumstances disclosed by the evidence, did not amount to a payment. In this we think that the court erred, and the instruction as given was erroneous, and not a correct charge as a matter of law. The check was given and offered as payment. The plaintiff retained the check, without expressly refusing it, for about one month, and until after the bank had closed its doors as insolvent. Under such circumstances, we think it should have been left to the jury to determine, under proper instructions from the court, whether or not the giving and retention of the check had the effect of payment.

“Where a check is given as payment, unless it be refused, it is the duty of the creditor to return it; an unreasonable delay in returning a check may make it equal to payment. *Conde v. Dreisam Gold M. Co.*, 3 Cal. App. 583, 589, 86 Pac. 825. Whether or not plaintiff in this case had kept the check for an unreasonable time was a question for the jury to determine, and was not a matter that should have been determined, as a matter of law, by the court. The fact that the check was not returned, or offered to be returned, until after the failure of

the bank is significant, and may account for this litigation.”

Whether a check was accepted as an absolute or conditional payment is one for the jury.

30 Cyc. 1295-6.

Considering that plaintiff retained these two warrants delivered to him as a partial adjustment of his claim he presented to the State for nearly a year and after he had received a letter from the Industrial Insurance Commission asking that they be returned (Record, p. 85) we submit that the question of whether plaintiff had elected to take under the Compensation Act should have been submitted to the jury, and that the court consequently erred in withdrawing the issue in question from their consideration.

SPECIFICATION OF ERROR NO. IV

Defendant requested the court to give the following instruction, which was refused:

“You are further instructed that it was the duty of the plaintiff to use his senses, his eyes and his ears, especially when working in or about a place where a collision with a car was likely to occur, in order to discover the proximity of a passing car of the defendant, and his failure so to do would constitute con-

tributory negligence and prevent any recovery on his part. The law requires one working in or about a street-car track to be on the lookout and to listen for approaching cars, and if you find in this case that the plaintiff failed to look and listen and that had he looked and listened he would have discovered the car, then his failure so to do would constitute contributory negligence and he cannot recover, and your verdict should be for the defendant.” (Record p. 203).

It is true that the Supreme Court of the State of Washington has frequently held that it is not always negligence as a matter of law for a person crossing a street railway track to fail to look and listen for approaching cars, but even those courts which hold that the stop, look and listen rule does not apply to persons crossing a street car track, have held that under some circumstances failure to so look and listen is negligence as a matter of law. The rule is well stated in *Denis v. St. Ry. Co.*, 104 Me. 39, 70 Atl. 1047, where the court said:

“It is true that the established rule respecting steam railroads, that it is negligence *per se* for a person to cross the track without first looking and listening for a coming train, has been repeatedly held by this court to be inapplicable to the crossing of the tracks of a street railway in a public street where the cars do not enjoy the exclusive right of way. It can-

not be declared as a matter of law that it is negligence *per se* for a traveler to cross the tracks of a street railway without first looking and listening for an approaching car. But, before crossing a street railway, the traveler is required to exercise all reasonable and ordinary care, prudence, and vigilance to avoid a collision with a street car, and, in exercising this degree of care, *he may be required as a matter of fact in many situations to look and listen for an approaching car before attempting to cross the track.* He must do for his own safety and for the safety of the passengers in the car what ordinarily, careful, thoughtful, and prudent persons are accustomed to do under like circumstances. Whether his failure to look and listen before crossing is to be deemed negligence must be determined upon all the facts and circumstances disclosed by the evidence. *Fairbanks v. Railway Co.*, 95 Me., 78, 49 Atl. 421; *Warren v. Railway Co.*, 95 Me. 115, 49 Atl. 609; *Butler v. Street Railway*, 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267; *Marden v. Street Railway*, 100 Me. 41, 60 Atl. 530, 69 L. R. A. 300, 109 Am. St. Rep. 476."

In accordance with the foregoing rule, this court has held in numerous cases that under the peculiar circumstances appearing it was negligence *per se* for the plaintiff to fail to look and listen before crossing a street railway track.

Mey v. Seattle Elec. Co., 47 Wash. 497;

Skinner v. Tacoma R. & P. Co., 46 Wash. 126;

Helleison v. Seattle Elec. Co., 56 Wash 278;

Fluhart v. Seattle Elec. Co., 65 Wash. 291;

Steuding v. Seattle Elec Co., 71 Wash. 476;

Bardshar v. Seattle Elec. Co., 72 Wash. 200;

Beeman v. P. S. T., L & P. Co., 37 Wash.

Dec. (Advance Sheets) 107, 139 Pac. 1087;

Kiely v. Seattle Elec. Co., 36 Wash. Dec. (Advance Sheets) 347, 139 Pac. 197.

What were the peculiar circumstances of the case at bar? Plaintiff had been working at this same kind of work for several months. He knew that cars frequently passed upon these tracks. He knew that there was nothing in the character of his work that demanded that he cross the tracks. His work was simple and in doing his work he was standing in a place of safety facing the approaching car. There were no noises to distract his attention. It was broad daylight and the approaching car could have been seen for 600 feet had he looked. Whether the gong was sounded or not the car must have made considerable noise as it approached the plaintiff.

Riedel v. Wheeling Traction Co., 63 W. Va. 522, 61 S. E. 821, 826;

Quinn v. R. Co., 57 N. Y. Supp. 544, 546.

There was nothing to interfere with plaintiff's hearing the car had he listened; nothing to prevent his seeing the car had he looked. One is at a loss to understand how an individual could exercise any care whatever under such circumstances to learn of a car's approach unless he used his senses of hearing and sight for that purpose. In the Kiely case, above cited, the facts were substantially the same as in the case at bar, except that there the manhole was constructed between the tracks and that there the plaintiff, as the car approached, was standing, not in a place of safety, but upon the track upon which the car was approaching, looking down into the manhole where another man was working, and under such circumstances it was held that the plaintiff in failing to look or listen for the approaching car, which he must have seen or heard had he looked or listened, was guilty of contributory negligence as a matter of law.

We respectfully submit that under the peculiar circumstances of this case it was the duty of plaintiff before stepping upon the track to look and listen for cars which he knew ran frequently upon the track, and therefore might be expected at any moment, and that the court erred in refusing to give the instruction requested.

SPECIFICATION OF ERROR NO. V

The court instructed the jury as follows:

“You are instructed, however, that if by a fair preponderance of the evidence, you believe that the car was running more than twelve miles an hour at the place of the accident, the burden of proof would, by such act be shifted to the defendant to show by a fair preponderance of the evidence that the injury, if one was sustained, was the result of contributory negligence on the part of the plaintiff and that such negligence was the proximate cause of the injury and without which it would not have happened.” (Record, p. 206).

The effect of this instruction was to tell the jury that if they found that the car which injured plaintiff was traveling more than twelve miles an hour, the burden was then cast upon defendant to establish contributory negligence, and that if defendant failed to establish contributory negligence plaintiff was entitled to recover. This was not the law applicable to the facts. The burden was not cast upon defendant to establish contributory negligence until the jury had not only found that the car was traveling at an unlawful speed, but *that such excessive speed was a proximate cause of plaintiff's injury*. The instruction was very misleading on this account if for no other reason, since it relieved

plaintiff of the necessity of proving one of the vital elements of actionable negligence, namely, that such negligence *caused* the injury complained of.

It is prejudicial error to give an instruction making defendant liable if he was negligent unless plaintiff was guilty of contributory negligence *as ignoring the necessity that the negligence proximately caused the injury.*

Washington etc., Ry. Co. v. Vaughan, 111 Va. 785, 69 S. E. 1035;

Maitland v. Gilbert Paper Co., 97 Wis. 476, 72 N. W. 1124;

Gulf etc. Ry. Co. v. Williams, (Tex.) 39 S. W. 967;

Louisville & N. R. Co. v. Banks, 132 Ala. 471, 31 So. 573;

Avery & Sons v. Meek, 96 Ky. 192, 28 S. W. 337.

The instruction complained of is subject to even a more serious objection. It will be observed that by it, His Honor below submitted to the jury the issue of the alleged negligence on the part of defendant in operating its car at an excessive or unlawful speed. On pages 19 to 24 *ante*, we have shown that the speed of the car was not the proximate cause of plaintiff's injuries. It was improper and prejudicial to defendant, therefore, for the court to submit to the jury the issue of whether or not

at the time of, or before, the accident, the car was traveling at an excessive speed.

The law is well settled that the giving of instructions in actions for personal injuries, which submit to the jury a ground of negligence not established by the evidence, is reversible error.

Buyken v. Lewis Construction Co., 51 Wash. 627, and cases cited;

Edison Gen. Elec. Co. v. Canadian Pac. Nav. Co., 8 Wash. 370;

Nye v. Kelly, 19 Wash. 73;

Maynard v. O. R. & N. Co., 46 Ore. 15, 78 Pac. 983.

Ill. Cent. R. Co. v. Vinson, (Ky.) 74 S. W. 671, 672;

Lexington R. Co. v. VanLadon's Adm'r., (Ky.) 107 S. W. 740;

St. Louis, etc., R. Co. v. Woodward, 70 Ark. 441, 69 S. W. 55, 56;

Mo. Pac. R. Co. v. Pierce, 33 Kan. 61, 5 Pac. 378;

Ala. & V. Ry. Co. v. Hayne, 76 Miss. 538, 24 So. 907.

Stevens v. Elec. Co., 132 Ia. 597, 109 N. W. 1090, 1092;

Galveston, etc., Ry. Co. v. Sullivan (Tex. Civ. App.) 42 S. W. 568;

Mo. Pac. Ry. Co. v. Platzer, 72 Tex. 117, 11 S. W. 160, 162;

Conklin v. Central N. Y. T. & T. Co., 114 N. Y. Supp. 190, 191;

Rinmann v. Construction Co., 114 Minn. 484, 131 N. W. 478;

New Orleans, etc., R. Co., v. Williams, 96 Miss. 373, 53 So. 619;

Reynolds v. United Rys. Co., 142 Mo. App. 708, 121 S. W. 1093;

Landers v. R. Co., 114 Mo. App. 655, 90 S. W. 117.

The following is quoted from *St. Louis, etc. R. Co. v. Woodward*, 70 Ark. 441, 69 S. W. 55, 56:

“There is no evidence in the case that the engineer in charge of the engine and moving cars could have done more than he did do to avoid the injury after he saw the ice wagon, and peril of its driver, for after the wagon got in view of the railroad track the train was stopped within from 34 to 80 feet, according to the testimony of the several witnesses, which was a reasonably short stop, even if the train was moving at a low rate of four to six miles an hour, as some of the witnesses testified. The part of the instruction covering the alleged negligence after he saw defendant’s perilous situation is not only without evidence to support it, but was calculated to confuse the jury, and di-

vert their minds from the real issue in the case, and was therefore improperly given. *Railway Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *U. S. v. Breiting*, 20 How. 252, 15 L. Ed. 900; *Railroad Co. v. Townsend*, 41 Ark. 382; *Railway Co. v. Hammond*, 58 Ark. 324, 24 S. W. 723. *Under the circumstances it cannot be determined whether the jury based their verdict upon the proper instructions given in the case or upon the erroneous instruction. The instructions, especially in a case like this, where every issue is sharply controverted by the evidence, should be direct, and to the point, and not at all misleading as to the real issues involved; otherwise there can be no fair trial.*"

For the reasons urged we respectfully submit that the judgment of the lower court should be reversed and the cause remanded for a new trial.

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A. J. FALKNOR,

Attorneys for Plaintiff in Error.

No. 2704

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PUGET SOUND TRACTION,
LIGHT & POWER COM-
PANY, a corporation,
Plaintiff in Error,

vs.

CHARLES J. SCHLEIF,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

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F. D. MONCKTON,
CLERK.

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STATEMENT OF THE CASE

The statement of the case by plaintiff in error is in the main correct but some additional facts appearing in the record should be stated.

1. The north side of the excavation was on a line with the south side of 55th street. Ex. C, 56, 179; Def. Ex. 4.

2. The west side of the excavation extended under the ends of the ties and to within 1.4 feet of the easterly rail. (75, 115, 127).

3. The defendant in error was required to be not only on the north side of the excavation but also to work "around" the same in the performance of his work. (73).

4. There was a plank laying across the edge of the hole for the men to step on so he could hand down the brick and mortar. (137).

5. The car approached within 10 or 12 feet of the defendant in error before ringing its gong. (138, 118, 125).

6. It was being driven at a speed of 15 or 20 miles per hour and was exceeding the ordinance from 3 to 8 miles per hour. It had entirely passed the crossing when stopped and ran from 60 to 80 feet after it struck the defendant in error. (128, 134, 121).

7. The exact cause of the stepping or springing upon the track—if it occurred—is not clear from the evidence, several different versions of the occurrence being given by the several witnesses. (120, 125, 58, 59, 60, 186, 182, 180, 137, 138).

8. If plank were there, they were placed there by the master for the workmen to use in handling the brick and mortar. (132, 138).

9. Five persons present at the street crossing wholly failed to hear any gong or bell sounded until just as the car struck the defendant in error. (135, 138, 59, 118, 125).

10. A man could not have stood between the excavation and the rail. (127-128).

11. The alleged "warrants" received and not returned by the injured man, from the "Insurance Commission" were not "warrants" but simply vouchers which he might sign and return and thereupon warrants would have been sent him. He did not execute them nor were there ever any "warrants" issued to him or any payment made or accepted under the Industrial Insurance Act. (80, 84; Ex. E, F, G).

12. The workman's master was immediately present directing and supervising the work. (136).

ARGUMENT

I

THE COURT DID NOT ERR IN DENYING
THE MOTION FOR A DIRECTED VERDICT
NOR IN REFUSING TO SUSTAIN THE CHALLENGE TO THE EVIDENCE.

In discussing the case it will avoid confusion if we adopt the suggestion followed by the plaintiff in error and refer to the parties as they were designated in the court below, viz: as "plaintiff" (meaning Schlieff) and "defendant" (meaning the Company).

THE VERDICT NEGATIVES ANY CONTRIBUTORY NEGLIGENCE

The unanimous rule in the Federal courts as in the State of Washington, is, that in an action to recover for injuries by being run over (or struck) by a street car, contributory negligence of the plaintiff is a defense, to be proved by the defendant.

Washington & G. R. Co. vs. Gladman, 15 Wall 401.

"The burden of proving contributory negligence rests on the defendant and it will not avail him unless it has been established by a preponderance of the evidence."

Union P. R. Co. vs. O'Brien, 161 U. S. 451.

Norman vs. Bellingham, 46 Wash. 205.

Where the evidence is at all conflicting upon the facts, the question of contributory negligence is exclusively for the jury.

Wash. & G. R. Co. vs. McDade, 135 U. S. 554.

Gunderson vs. Bieren et al, 38 Wash. Dec. 350 (July, 1914).

Morgan vs. Rainier Beach Co., 51 Wash. 335.

Garretson vs. Tacoma R. & P. Co., 50 Wash. 24.

Whether there were planks placed beside the hole by the employer for the men to stand on in passing down brick—as testified by Krogh, the master (137); or whether the plank were laid down to serve as cross-walks as claimed by Higley (179-80); or whether they were there at all at the time of the accident, as doubted by Schlief (76-77); whether such plank—if there—projected three or four inches, as indicated by Kroon (116-17) or 18 to 24 inches or 12 inches as testified by Higley and Davidson (180-82); whether the planks were three or four feet long and hence ready to teter with only the slightest weight on them beyond the center or were capable of safe use by standing on them almost at the extreme end near the excavation; whether Schlief actually stepped on the plank and it gave way, causing him to spring aside to avoid a fall (120), or whether he “made a misstep” before he stepped on the plank (138); or whether he stepped in front of the car of his own volition and without other impelling cause (117), (125-7), (186); all these are controverted facts and under the rule are for the jury alone and their verdict must be construed most favorably for the injured man.

It may have been that the planks were so placed by the master without due care and being in a dangerous position, negligently so placed by him, the plaintiff stepped on them in the course of his duty relying upon the duty of his master to afford him a safe place to work and safe appliances to work with, and the boards giving made plaintiff spring aside to avoid a fall into the hole and not having heard any warning signal, sprung upon the track, in the sudden emergency, to his injury.

In such a case, the plaintiff could not be charged with the concurring negligence of his master with that of the defendant, but both of them would be liable for his injury.

Being obliged to act instantly, he is not responsible for the error of judgment—if any—and it was not negligence for him to so act. Just how it really occurred was for the jury to say.

Undoubtedly, had the gong been ringing as caution required, it would have attracted his attention and prevented the accident.

It is a question for the jury, whether it was an unsafe rate of speed without sounding a warning. Defendant's negligence and the contributory negligence of plaintiff, if any, were proper for the jury. The look and listen rule does not apply to those using a street railroad crossing as to the crossing of a steam railroad.

“Deceased might have been led into a feeling of security by reason of the absence of any warning. There is no presumption that the deceased was negligent. On the contrary, the burden is on the defendant to prove it.”

Holmgren vs. St. Paul City St. Ry., 63 N. W. 270.

Or, had the car been running at the lawful rate of speed, it would not have been there at that particular moment to inflict the injury.

Knowing that men were at work beside the track, their minds naturally intent on their work, the motorman was charged with the duty to warn them by his gong of his approach and to control his car that such accidents might not happen. Ordinary care and the caution which a reasonably prudent man would use required this.

The plaintiff was upon the street crossing, where the defendant ought to expect to find people crossing its track, and the duty to “look and listen” did not rest upon the plaintiff to the extent of making his failure to do so negligence *per se*.

All the circumstances must be considered, and therefore it was most seemly to submit the whole question of negligence and contributory negligence to the jury under due instructions.

Louis vs. Binghampton R. Co., 54 N. Y. Supp. 452.

Bengivenga vs. Brooklyn H. R. Co., 62 N. Y. Supp. 912.

Burns vs. Second Ave. R. Co., 48 N. Y. Supp. 523.

Smith vs. Bailey, 43 N. Y. Supp. 856.

Diapalo vs. Third Ave. R. Co., 67 N. Y. Supp. 421.

O'Connor vs. Union R. Co., 73 N. Y. Supp. 606.

Houston City Street Ry. vs. Woodlock, 29 S. W. 817.

O'Leary vs. Haverhill St. Ry., 79 N. E. 733.

A recent and pertinent authority is *Chunn vs. City & Suburban Ry.*, 207 U. S. 306 (52 L. Ed. 220).

The rule as to the province of the jury in such cases is well annotated in the foot-note to *N. P. R. Co. vs. Egeland*, 163 U. S. 93, 41 L. Ed. 82.

The decisions of this State are in harmony with our contention.

Tecklenburg vs. Everett Ry., 59 Wash. 387
et cit.

Henry vs. Seattle E. Co., 55 Wash. 447.

Keefe vs. Seattle E. Co., 55 Wash. 451.

II

THE NEGLIGENCE OF THE DEFENDANT IS BEYOND QUESTION IN BOTH THE PAR- TICULARS ALLEGED.

Defendant was running at an unlawful rate of speed as it approached the crossing; it was not sounding any alarm to warn plaintiff of its approach. (118).

Running a car between 11.96 and 17 miles per hour is evidence tending to support a finding that defendant was negligent—the ordinance limiting such speed to 12 miles per hour.

Riley vs. Salt Lake R. T. Co., 37 Pac. 681.

Kumpf places the speed at 15 to 20 miles per hour. (128).

Krogh says the rear of the car passed the crossing—as the car was 36 feet long exclusive of entrance and fender, it must have travelled 50 feet or more before stopping, under the emergency brake. (121), (177), (171).

Hanson says it went 60 or 80 feet before it stopped, after it struck plaintiff. (134).

While all agree that there was nothing to prevent hearing the gong if rung, five men testify that it was not heard till just as the car struck plaintiff.

Plaintiff was seen by the motorman while still 600 or 800 feet away. (173). Yet he came within 20 or 30 feet before ringing his bell, by his own statement. (173).

At a street crossing, running a street car at an excessive speed or without giving proper warning of its approach, is evidence tending to prove negligence. Proof of the distance the car ran with the brake firmly set, after the collision, was evidence tending to prove excessive speed.

Pierce vs. Lincoln Trac. Co., 139 N. W. 656.

Indianapolis S. Ry. Co. vs. Bordenchecker,
70 N. E. 995.

The negligence of the defendant being thus clearly established, the burden is upon the defendant to show, by clear and satisfactory evidence, that plaintiff's negligence occurred and contributed to the injury. *

This makes it incumbent to show just what the plaintiff did in the premises and that such acts constituted his own negligence.

If defendant failed to show this to the satisfaction of the jury, they were bound to find for the plaintiff.

Defendant makes no account of the important fact that, if the accident occurred as Krogh and Kumpf say it did, viz: by plaintiff stepping on a tetering board, placed there by Krogh, his master, for his use in his work, it must have occurred through the negligence of Krogh and the defendant concurring; in which case the defendant is liable.

Who can say what action the plaintiff would have taken if the gong had been suitably rung? Which way would he have jumped? Or, would he have jumped at all?

Who can say where the car would have been had it been run at a lawful rate of speed? Clearly it would not have been at the point of the collision at that exact moment, and the plaintiff would not have been struck by it.

At 15 miles per hour, it was travelling 4.4 feet per second, in excess of the lawful distance. At 20 miles per hour it was travelling 11.7 feet per second in excess of the lawful distance.

If the boards were three feet long and projected 1½ feet beyond the edge of the excavation—as claimed by defendant's witnesses Higley and Davidson (180-182), they were just balanced on the edge of the hole and could not have been used, as they had been for hours before the accident. The evidence is not clear as claimed by the defendant. It was then for the jury to determine the facts.

It is undisputed that plaintiff was in the discharge of his duties and that it was incumbent upon him to fix his attention on his work and to pass around, on various sides of the excavation (73), to enable him to reach the mason and deliver his brick as required.

As he could not stand between the rail and the hole, he must from time to time step up on the track or on the concrete between the rail and the hole, and he must rely on the full discharge of the duty devolving on the defendant to warn him of its approaching cars by the usual signal. If he had to be looking out for the cars all the time he would be unable to do his work.

III

DEFENDANT IS NOT EXCUSED BY THE CONCURRENT NEGLIGENCE OF KROGH

If his master had supplied him with a defective instrumentality and in using it he was thrown into a position of danger, it was no fault imputable to plaintiff, and if by the concurring neglect of the defendant, he was there injured, the defendant as well as Krogh are liable to him for his injury.

“It is a general rule that a person injured by the fault of another, without which fault the

injury could not have occurred, is not to be deprived of his remedy because the fault of a stranger, not in privity with him, also contributed to the injury.”

Buswell on Pers. Injuries, Sec. 103 et cit.

Schmidt vs. Transit Co., 120 S. W. 96.

Newcomb vs. Ry., 69 S. W. 348.

Straub vs. St. Louis, 75 S. W. 100.

Harrison vs. K. C. E. L. Co., 93 S. W. 951.

Herdt vs. Koenig, 119 S. W. 56.

Brennan vs. St. Louis, 2 S. W. 481.

Hull vs. K. City, 14 Am. Rep. 487.

Bassett vs. City of St. Jo, 14 Am. Rep. 446.

Fledderman vs. St. Louis T. Co., 113 S. W.
1143.

Pastene vs. Adams, 49 Calif. 88.

Martin vs. North Star Iron Wks., 31 Minn.
410.

Hunt vs. Mo. R. Co., 14 Mo. App. 161.

Lane vs. Atlantic Works, 107 Mass. 108.

Jacksonville R. Co. vs. Peninsular Co., 17 L.
R. A. 52.

IV

THE "LOOK AND LISTEN" DOCTRINE IS NOT APPLICABLE HERE.

Our own court has frequently held that the rule which applies to the traveller approaching a railroad crossing does not apply to one crossing a *street* railroad at the usual crossing place.

Morris vs. Seattle, R. & S. Ry., 66 Wash. 696.

Roberts vs. Spokane St. Ry., 23 Wash. 325-35.

Travers vs. Spokane St. Ry., 25 Wash. 237.

Burien vs. Seattle Elec. Co., 26 Wash. 612.

Chisholm vs. Ry. Co., 27 Wash. 240.

V

EXCEEDING THE SPEED LIMIT IS NEGLIGENCE *PER SE*.

O'Brien vs. Water Power Co., 71 Wash. 693.

Wilson vs. P. S. E. Co., 52 Wash. 522.

Travers vs. Spokane St. Ry., 25 Wash. 225.

Engelker vs. S. E. Ry., 50 Wash. 196.

VI

FAILURE TO RING THE BELL IS NEGLIGENCE *PER SE*.

“If a motorman assumes to drive his car at an excessive speed, he cannot be excused from his duty to ring his bell and give such warning as is commensurate with increased hazard, for it is the measure of due care.”

Peterson vs. Seattle Elec. Ry., 72 Wash. 351.

The fact that plaintiff's attention was necessarily fixed closely upon his work is an important element in determining the question of his negligence in omitting to watch constantly for approaching cars.

Grant vs. O-W. R. & N. Ry. Co., 54 Wash. 678-84 et cit.

A close examination of the numerous cases cited by the defendant in its exhaustive brief fails to find support in the authorities cited for its contentions here. In each case, the facts plainly distinguish it from the case at bar. Either elements here found were there lacking or the reverse is true.

In the important citation, *Kieley vs. S. E. Co.*, 139 Pac. 197, a late Washington case, the important distinction, on which the very case turned, was the fact that

“a repeating gong upon the car was sounded and continued ringing for a distance of from 75 to 200 feet before it reached respondent. The evidence upon this point, which is without practical dispute, is so overwhelming that it disposes of any contention of negligence by reason of appellant’s failure to give warning of the approaching car.”

Here, the motorman himself only claims to have rung his gong between 20 and 30 feet before he reached the plaintiff (173), while the five men present, Kgogh, Kumpf, Hanson, Kroon and Schlieff say it did not ring until within 6 to 12 feet of him. Even the motorman confessed to negligence, in that regard. He saw the plaintiff while 600 to 800 feet distant. (173).

Other cases cited are as easily distinguished.

VII

THE EMPLOYERS LIABILITY ACT DOES NOT APPLY.

Plaintiff was injured by the St. Ry. Co.—a person not in the same employ—and away from the “plant” of his master, Krogh & Jesson.

The Act does not pretend to cover such cases. At best it leaves it to him to elect which he shall

hold responsible—the company or the state. He made due election and gave due notice of it to the state. See exhibits E, F, and G. (84).

This court has expressly determined this question in *Meese vs. N. P. Ry. Co.*, 211 Fed. 254, and so clearly that it is not subject to argument.

VIII

NO “WARRANT” WAS EVER ISSUED BY
THE STATE NOR ACCEPTED BY THE
PPLAINTIFF.

Defendant employs a large space to argue upon the effect of the receipt and acceptance of “checks” or “warrants” for damages from the State Industrial Insurance department.

It is sufficient to say that the evidence does not support its contention. No “warrant” was ever issued by the state nor received by the plaintiff. The papers miscalled “warrants” were mere proofs of claim and vouchers for monthly indemnity which had been sent him by the State and which had to be executed by plaintiff and returned to the State before the *warrants* would be issued. As he declined to execute them they were mere waste paper. This clearly appears by inspection of Exhibits E, F and G. He promptly notified the State of his election and refusal to take under the State Indemnity law. (84).

IX

NO ERROR IN THE CHARGE

The numerous requests to charge are not applicable to the facts proved. The charge as a whole fairly and correctly states the law of the case. It is even more favorable to the defendant than it had a right to ask. And upon the facts as found, the jury determined in favor of the plaintiff.

Instruction V. was of course accompanied by the other instructions given by the court and based upon the proved and admitted fact that the plaintiff was injured by being struck by the car of defendant. If that car was running at an unlawful rate of speed, and without warning of its approach, these facts were in themselves negligence, which imposed upon the defendant, under those understood conditions, the duty to show by a preponderance of the evidence, that the injury was proximately caused by the contributory negligence of the plaintiff. The instruction is correct.

There is no error in the record and the verdict should not be disturbed.

Respectfully submitted,

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No. 2407

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Defendant in Error.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Comes now the Puget Sound Traction, Light & Power Company and respectfully petitions the court for a rehearing and submits the following points for the consideration of the court:

(1) In the statement of facts in the opinion filed herein, this court says:

“He could have seen the car, had he been looking, at a distance of at least 600 feet. He testified that he was engaged about his work and was not looking, or thinking about the car, and did not hear the car approaching.”

In the opinion the court says:

“Error is assigned to the refusal of a requested instruction on the subject of the duty of the plaintiff to use his senses, his eyes and his ears, especially when working in or about a place where a collision with a car was likely to occur. But on examining the instructions, it is seen that the court charged the jury sufficiently on that branch of the case as follows: ‘And a person is required to make reasonable use of his eyes and ears; that is, he is required to look and listen for approaching cars when employed near the track and to do such acts as a reasonably prudent man would under like circumstances.’ ”

Your Honors thus holding that the instruction of the trial court to the effect that “a person is required to make reasonable use of his eyes and ears; that is, he is required to look and listen for approaching cars when employed near the track and to do such acts as a reasonably prudent man would under like circumstances,” is sufficient. It would appear therefore from Your Honors’ opinion that

a person is required to make reasonable use of his eyes and ears to look and listen for approaching cars when employed near the track and to do such acts as a reasonably prudent man would do under like circumstances. Your Honors properly conclude from the evidence that the defendant in error could have seen the car had he been looking for a distance of at least 600 feet, and that he was not looking or thinking about the car and did not hear the car approaching. It would seem from Your Honors' finding then the defendant in error exercised no care whatever, and yet it would appear from Your Honors' opinion that a person when employed near the track is required to make reasonable use of his eyes and ears and to look and listen for approaching cars. Having found that he did not exercise this care, and having approved the announcement of the trial judge that he should do so, it would seem logical that the defendant in error was guilty of contributory negligence. The announcement of the trial judge which is quoted with approval by this court is not new. While it is true that the doctrine of look and listen as applied to steam railways is not applicable to electric railways in a public street, "such a rule does not mean that one can heedlessly and carelessly cross the track without using his senses for his protection, nor does it mean that those who have eyes to see but see not and ears to hear but hear not are exercising due care."

Helleisen v. Seattle Elec. Co., 56 Wash. 278.

Your Honors will recall that the defendant in error was standing to the north of the manhole. His face, therefore, would be in the direction from which the car was approaching. All he had to do was to lift his eyes and he would have observed the car. It would appear improbable for a person standing in such a position to avoid seeing the car approaching. Again, even if no gong were sounded the plaintiff in error contends that a heavy street car going at the rate of speed that defendant in error contends, independent of the sounding of any gong, would make such an amount of noise that the defendant in error had he given the slightest heed must have heard it. While it was true that he was engaged at work it does not appear that the work was of such an unusual character as to have drowned the ordinary noise of an approaching car.

“We know that a heavy modern street car, running at fifteen or more miles an hour in an outlying district of the city, no traffic upon the streets, no interfering noises, will make some noise as it approaches,” etc.

Armstrong v. Spokane and Inland Empire Ry. Co., 71 Wash. 624, 628.

“While we do not judicially know how much noise a moving street car makes, nor how far it can be heard, we do know that in a quiet, deserted street it can be heard for a considerable distance, in fact, several hundred feet, and

that the noise is sufficient to attract the attention of any one whose mind is not so preoccupied with something else as to exclude it."

Riedel v. Wheeling Traction Co., 61 S. E. 821, 826, 63 W. Va. 522.

"Nature has provided two senses for personal protection, the use of either of which might have given plaintiff warning of the approaching car; for it is of common knowledge that a trolley car in motion makes, by friction with the track, a noise more or less audible, and that, as the wheel of the trolley pole runs along the wire overhead, a whirring sound is caused, increasing in intensity with the speed of the car. One of the plaintiff's witnesses testified that the car was going at a high rate of speed, and, this being assumed, the whir must have been noticeable. If the plaintiff had listened, he might have heard both of these sounds. So, also, a car in motion has the electric current at work, and, after dark, the electric lamps lighted. It taxes credulity to believe that, if the plaintiff had either looked or listened, he would not have become aware of the proximity of the car."

Quinn v. Brooklyn City Ry. Co., 57 N. Y. Supp. 544, 546.

This Court cites in its opinion the case of *Hanley v. Boston Elevated Railway*, 201 Mass. 55. The plaintiff in error believes that a rereading of that

opinion when considered with the facts in this case removes that decision from an authority herein, and that the decision therein ought not to be held as exonerating the defendant in error from his own carelessness in this case. In *Hanley v. Boston Elevated Railway, supra*, the injured person was a member of a gang of workmen engaged in repairing a gas main. The railway had stationed a flagman in the vicinity whose duty apparently was not only to warn travelers on the street to avoid the danger, but also to warn the men at work when cars were approaching on the track, and that previous to the approach of the car which caused the accident, this flagman had notified the injured party whenever a car was coming. In reference to this phase the court said:

“If before the flagman came the plaintiff looked out for himself, it cannot be said as matter of law that after his arrival he was negligent because to quite an extent he relied upon the warning from him instead of relying entirely upon his own observations. The flagman, among other duties, attended for this very purpose, and had previously warned the plaintiff of the approach of cars until just before the accident. If the defendant did not intend the plaintiff or his fellows to understand that they were to be warned when cars were to pass, then having misled the plaintiff to his harm it should not be permitted to turn around and

say that notwithstanding its conduct the plaintiff took his chances and should have depended entirely upon himself.”

In the present case the defendant in error had relied upon his own observation to determine whether a car was approaching or not. The plaintiff in error had not in any wise misled the defendant in error. It was incumbent upon him to look out for himself. Again it would appear from the decision in said case that the injured person was working at a place where he would be struck unless “he leaned far over enough to his left hand as they (cars) passed.” In the present case the defendant in error, admittedly, as stated in Your Honors’ summary of the facts, “was standing north of the center of the hole and at a point where a car approaching from the south on the easterly track could easily pass him.” Again it is apparent from the opinion in the Hanley case that the flagman knew of the excavation and that the plaintiff was obliged to stand on the top of the pipe, which naturally might become slippery and consequently in the performance of his work the plaintiff might lose his balance and reach over and hold onto the rail to prevent himself from falling, and, as indicated near the close of the opinion that the combination of circumstances out of which the accident arose left it as a question for the jury to determine whether or not it was reasonably unforeseeable. In the

present case there was nothing about the combination of circumstances out of which the accident arose from which it could be said that the operators of the car might reasonably foresee that the defendant in error would step upon an unsupported board and to avoid falling into the manhole jump onto the track. We have no quarrel with the decision in the case of *Hanley v. Boston Elevated Railway*, *supra*, but counsel for the plaintiff in error respectfully submit that the defendant in error does not occupy a sufficiently favorable position under the evidence in this case to entitle him to the benefits of that decision.

(2) Counsel for plaintiff in error also respectfully submit that since the defendant in error was in a place where "the car could easily pass him," the alleged excessive speed and failure to sound the gong were not the proximate causes of the accident. If the car had been going twelve miles per hour at the time that the defendant in error involuntarily, if he did so, stepped upon the track, there is no evidence or contention that the car could have been stopped in time to have avoided the accident. Therefore the excessive speed could not be the proximate cause of the accident. The accident would have occurred beyond doubt had the car been going at a rate of speed considerably less than twelve miles per hour. Again to say that if the gong had been sounded, taking no notice of the well known fact that a car weighing many

tons, going at a considerable speed makes considerable noise and can be heard for blocks, gave no warning by sounding the bell until the defendant in error jumped on the track was the proximate cause of the accident allows the jury to enter the realm of speculation. A person acting involuntarily in order to avoid falling into a hole is just as liable to step in front of the car as otherwise.

Juries cannot be permitted to determine the proximate cause of accidents by entering into the realm of speculation or conjecture.

Armstrong v. Town of Cosmopolis, 32 Wash. 110.

The following citation from the case of *Hyer v. Janesville*, 101 Wis. 371, is approved by the Supreme Court of the State of Washington in the case of *Reidhead v. Skagit County*, 33 Wash. 174, 180:

“It has been said by this and other courts repeatedly, and is the established law, that a jury cannot properly be allowed to determine disputed questions of fact from mere conjecture. There must be some direct evidence of the fact, or evidence tending to establish circumstances from which a jury would be warranted in saying that the inferences therefrom clearly preponderate in favor of the existence of the fact, else the question should not go to the jury for determination at all. To allow a jury to reach a conclusion in favor of the

party on whom the burden of proof rests, by merely theorizing and conjecturing, will not do. There must at least be sufficient evidence to remove the question from the realms of mere conjecture, else the trial court should pronounce the judgment of the law on the situation by taking the case from the jury when requested so to do."

At best it can only be claimed that had the defendant in error's evidence shown that the bell of the car had been sounded then he might not have involuntarily jumped on the track. Is not that only a possibility? Does not that allow the jury to speculate as to the proximate cause of the accident? The plaintiff in error refers to the authorities in its brief on pages 20-27, inclusive, as showing that it is not sufficient to simply establish negligence against the plaintiff in error, but it must further affirmatively appear that such negligent acts were the proximate causes of the accident.

III.

The defendant in error himself recognizes that his employment was covered by the Workmen's Compensation Act. Why? Because he presented a claim to the State under and in accordance with that act. And further, thereafter in accordance with said act, attempted to elect to sue the alleged

negligent third party. In this respect the plaintiff in error contends, that by presenting his claim to the State, the defendant in error elected to look to the State for compensation. But he did more than that. He received from the State at least two documents that it rested within his power to convert to his own use. The State requested that these documents be returned. Up to the time of the trial of this action he had not returned them. Why? Plaintiff in error contends that he was speculating upon the outcome of this suit and had he lost this suit he would then have attempted to obtain the benefits of the State's award. If such were his purposes might not a jury reasonably say that he had made a definite and final claim to the State? The plaintiff in error is not disposed to contend that as a matter of law defendant in error's conduct was such as to estop him from suing the plaintiff in error but what plaintiff in error does contend is that his conduct was such that a jury might reasonably believe, and might properly find, required him to look to the State of Washington for his compensation. Apparently Your Honors' opinion disposes of this contention on the theory that as a matter of law defendant in error has not estopped himself from prosecuting this action. The plaintiff in error contends that there was a question of fact at least for the jury to say whether or not his conduct amounted to an election to recover from the State.

Plaintiff in error respectfully submits the foregoing Petition for Rehearing and asks that a rehearing be granted and for such relief as it has heretofore prayed.

Respectfully submitted,

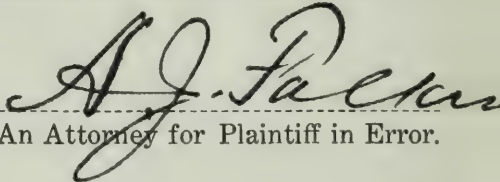
JAMES B. HOWE,

A. J. FALKNOR,

Attorneys for Plaintiff in Error.

STATE OF WASHINGTON, }
COUNTY OF KING. } SS.

I HEREBY CERTIFY that in my judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay.


An Attorney for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. STERN and B. FLEISCHER, Partners Doing
Business Under the Firm Name and Style of
J. STERN & COMPANY,

Appellants,

vs.

CARLOTTA C. FERNANDEZ and THOMAS B.
FERNANDEZ, Executrix and Executor of
the Last Will and Testament of B. FERNAN-
DEZ, Deceased,

Appellees.

Apostles.

Upon Appeal from the United States District Court
for the Northern District of California,
First Division.

Filed

JUL - 1 1914

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
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J. STERN and B. FLEISCHER, Partners Doing
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Affidavit of Thomas B. Fernandez.....	12
Affidavit of H. W. Hutton.....	11
Amendment to Libel.....	104
Answer	17
Assignment of Errors.....	109
Certificate of Clerk U. S. District Court to Apostles on Appeal.....	111
Certificate of U. S. Commissioner to Testimony Taken Under Order of Reference.....	103
Decree Dismissing Libel.....	107
Exceptions to Libel.....	8
Libel	5
Libel, Amendment to.....	104
Notice of Appeal.....	108
Notice of Hearing of Exceptions to Libel.....	16
Notice of Motion for Substitution of Parties Respondent and of Motion to Dismiss Action.	9
Opinion	106
Opinion on Motion for Substitution of Parties Respondent and on Motion to Dismiss Libel	15
Order Continuing Cause to Permit Libelant to Introduce Evidence in Rebuttal.....	104

Index.	Page
Order Extending Time to File Apostles on Appeal and Assignment of Errors.....	110
Order Extending Time to March 31, 1914, to File Apostles on Appeal and Assignment of Errors	113
Order Extending Time to April 20, 1914, to File Apostles on Appeal and Assignment of Errors.	114
Order of Submission of Motions for Substitution and to Dismiss.....	14
Order Overruling Exceptions to Libel.....	17
Order Referring Cause to U. S. Commissioner to Take Testimony	24
Praeipie for Apostles on Appeal.....	1
Record of Hearing—Monday, September 22, 1913	24
Record of Hearing, Saturday, November 1, 1913.	104
Statement of Case by Mr. Nathan H. Frank, Proctor for the Respondent.....	25
Statement of Clerk U. S. District Court.....	1
Stipulation That Title of Court and Cause be Omitted from Captions in Printing of Record on Appeal.....	115
Testimony Taken in Open Court.....	25
TESTIMONY ON BEHALF OF LIBEL-ANTS:	
ERICKSON, JOHN	59
Cross-examination	61
Redirect Examination	64

Index.	Page
TESTIMONY ON BEHALF OF LIBEL- ANTS—Continued:	
FLEISCHER, BENEDICT	27
Cross-examination	29
Redirect Examination	30
Recross-examination	33
TESTIMONY ON BEHALF OF RESPOND- ENT:	
EWALD, PAUL	76
Cross-examination	83
Redirect Examination	100
Recross-examination	102
FERNANDEZ, THOMAS D.	53
Cross-examination	54
SOMMER, P. H.	48
Cross-examination	51
Redirect Examination	52
Recross-examination	53
TIETJAN, B. H.	34
Cross-examination	39
Redirect Examination	46
Recalled	55
Cross-examination	57
TIETJEN, C. H. (Recalled)	67
Cross-examination	69
Redirect Examination	72
Recross-examination	72

[Title of Court and Cause.]

Praeipice for Apostles on Appeal.

To the Clerk of the District Court of the United States, in and for the Northern District of California, First Division:

You will please prepare Apostles on Appeal in the cause above entitled, in pursuance of and in accordance with the requirements of Rule 4, sec. 1, of the Rules in Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit, and append your certificate thereto, as required by Rule 5 of said Rules.

Dated February 20, 1914.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Libelants.

[Endorsed]: Filed Feb. 20, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

[Title of Court and Cause.]

Statement of Clerk U. S. District Court.

PARTIES.

LIBELANTS: J. Stern and B. Fleischer, partners doing business under the firm name and style of J. Stern and Company.

RESPONDENTS: B. Fernandez (Original Respondent) and Thomas B. Fernandez and Carlotta C. Fernandez (Substituted Respondents).

*Page-number appearing at foot of page of original certified Record.

PROCTORS

for

LIBELANTS: Messrs. Frank and Mansfield (Original Proctors), Nathan H. Frank, Esquire, and Irving H. Frank, Esquire (Proctors perfecting appeal), San Francisco, California. [2]

RESPONDENT: H. W. Hutton, Esquire, San Francisco, California.

PROCEEDINGS.

1905.

November 13. Filed verified Libel.

Issued Citation for the appearance of respondent, etc., and which said Citation was afterwards on the 28th day of November, 1905, returned and filed with the following return of the United States Marshal, endorsed thereon: "The within Writ is returned unexecuted as no instructions were given to the United States Marshal by Proctors for Libelant on whom to serve the process or where the parties could be found, and no deposit to cover costs were made to the Marshal, as required by the United States Attorney General, before service of process.

JOHN H. SHINE,

United States Marshal.

By A. L. Farish,

Chief Office Deputy.

San Francisco, Cal., Nov., 28, 1905."

December 9. Filed Respondent's Exceptions to Libel.

1912.

October 8. Filed Notice of and Motion for Substitution of Respondent and to Dismiss Libel. [3]

October 14. A hearing was this day had on the Motion to Substitute Respondent and to Dismiss Libel in the District Court of the United States, for the Northern District of California, First Division. The Honorable John J. De Haven, Judge, presiding, after hearing the respective parties, the matter was submitted to the Court.

November 8. Filed Opinion, granting motion to substitute defendants and denying motion to dismiss.

November 11. A hearing was this day had on the exceptions to the Libel, in the said District Court, the Honorable John J. De Haven presiding, and after hearing counsel for the respective parties, the Court ordered said exceptions overruled.

November 25. Filed Answer of Respondent.

1913.

February 6. The Court (Frank S. Dietrich, Judge, presiding) this day ordered the matter referred to United

States Commissioner, Francis Krull, to take the testimony offered and report the same to the Court.

September 22. The above-entitled case this day came on for trial in the said District Court, before the Honorable M. T. Dooling, Judge, and after hearing, etc., the case was argued and submitted. [4]

October 27. Filed notice of and motion for the setting aside of submission of this case and reopened for the purpose of allowing respondent to make additional proofs.

November 1. A hearing was this day had in said court (M. T. Dooling, Judge, presiding) on the motion to set aside submission and reopen the case, and after hearing the respective parties, the Court granted said motion, etc.

Filed Amended Libel.

December 5. Filed Opinion in favor of respondents.

December 15. Filed Decree.
1914.

February 20. Filed Notice of Appeal.

February 26. Filed two volumes of testimony taken in open court.

February 27. Filed one volume of testimony

taken before United States Commissioner.

February 28. Filed Bond on Appeal and Supersedeas in the sum of \$500.00, with S. J. Newman and A. L. Frank, as sureties.

April 20. Filed Assignment of Errors. [5]

UNITED STATES OF AMERICA.

District Court of the United States of America, for the Northern District of California.

IN ADMIRALTY.

J. STERN and B. FLEISCHER, Partners Doing Business Under the Firm Name and Style of J. STERN & CO.,

Libelants,

vs.

B. FERNANDEZ,

Respondent.

Libel.

To the Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States for the Northern District of California:

THE LIBEL OF

J. Stern and B. Fleischer, partners doing business under the firm name and style of J. Stern & Co., against the respondent, B. Fernandez, and against all persons lawfully intervening for *for* their interest therein, in a cause of contract civil and maritime, alleges: [6]

I.

That at all the times hereinafter mentioned the said libelants, J. Stern and B. Fleischer, were and still are co-partners doing business in the City and County of San Francisco, State of California, and in Rio Vista, County of Solano, in said State, under the firm name and style of J. Stern & Co.

II.

That heretofore, to wit, on the 17th day of October, 1904, the said libelants shipped on board the schooner "Francis E. M. Bernard," then lying in the Sacramento River, in said State of California, and bound on the voyage to the port of San Francisco, in said State, in good order and well conditioned, to be carried and transported in said schooner to said port of San Francisco, and delivered to the said libelants in like good order and condition, one thousand and eight (1,008) sacks of beans, which said merchandise the master of said vessel then and there received on board and promised and agreed to transport, as aforesaid, to the said port of San Francisco and there deliver in like good order and condition to said libelants.

III

That said schooner proceeded with said merchandise on board bound for said port of San Francisco, and notwithstanding these libelants have been at all times ready and willing, and still are ready and willing, to receive said merchandise in good order, and upon receiving the same to pay the freight thereon, yet the said master has not delivered the same, nor any part thereof to said libelants; but, on the contrary, owing to the unseaworthy condition of said

vessel, and to the insufficient manning thereof, and to the negligence and carelessness of the said respondent, the said merchandise was on the 17th day of October, 1904, totally lost and destroyed, whereby the said [7] libelants have suffered damage in the sum of Two Thousand Three Hundred and Seventy-seven and 5/100 (2,377.05) Dollars.

IV.

That the said libelants have requested the said respondent to make good their said loss and damage, and to pay the said sum of Two Thousand Three Hundred and Seventy-seven and 5/100 (2,377.05) Dollars, but the said respondent has refused, and still continues to refuse, to pay the same, or any part thereof.

V.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, said libelants pray that a monition in due form of law, according to the practice and course of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against said B. Fernandez, and that he may be cited to appear and answer upon oath all and singular the premises aforesaid; that this Honorable Court will be pleased to decree the payment of the amount due to said libelants, as aforesaid, together with interest from said 17th day of October, 1904, and costs of suit; and that said libelants may have such other and

further relief as in law and justice they may be entitled to receive.

J. STERN & CO.

By J. STERN.

Northern District of California,—ss.

Sworn to before me this 13th day of November,
A. D. 1905.

[Seal]

J. S. MANLEY,

Deputy Clerk U. S. District Court, Northern District
of California [8]

FRANK and MANSFIELD,

Proctors for Libelants.

[Endorsed]: Filed Nov. 13, 1905. J. P. Brown,
Clerk. By J. S. Manley, Deputy Clerk. [9]

[Title of Court and Cause.]

Exceptions to Libel.

To the Honorable J. J. DE HAVEN, Judge of said
Court.

Defendant in said cause excepts to the libel of J.
Stern and B. Fleischer, libelants, on the following
grounds, to wit:

I.

For that the said libel is not sufficiently specific in
this, that it cannot be ascertained therefrom in what
particulars the said schooner "Francis E. M. Ber-
nard" was unseaworthy, and what caused her unsea-
worthiness.

II.

For that it cannot be ascertained from the face of
said libel in what particulars the said "Francis E.

M. Bernard'' was insufficiently manned.

III.

For that it cannot be ascertained therefrom in what particulars or how the defendant herein was negligent or careless in carrying the merchandise mentioned in said libel.

WHEREFORE, said respondent prays that these exceptions may be sustained and the said libel dismissed.

H. W. HUTTON,

Proctor for Respondent. [10]

Service admitted this 8th day of Dec. 1905.

FRANK and MANSFIELD,

Proctors for Libellant.

[Endorsed]: Filed Dec. 9, 1905. Jas. P. Brown,
Clerk. By John Fougá, Deputy Clerk. [11]

[Notice of Motion for Substitution of Parties Respondent and of Motion to Dismiss Action.]

[Title of Court and Cause.]

The libellants above named and their proctors will please take notice that Thomas B. Fernandez and Carlotta C. Fernandez, the executor and executrix of the last will of B. Fernandez, the above-named defendant, now deceased, will move the above court at the courtroom thereof, United States Post-office and Courtroom Building, in the City and County of San Francisco, State of California, on Saturday, the 12th day of October, 1912, at the hour of ten o'clock, in the forenoon of that day or as soon thereafter as counsel can be heard for an order of

said Court, substituting the said Thomas B. Fernandez and the said Carlotta C. Fernandez, the defendants in said cause, in the place and stead of B. Fernandez, and at said time and place they will further move the said Court to dismiss the above-entitled action.

Said motions will be made upon the following grounds, to wit, that said B. Fernandez, the defendant above named, is now dead, and the said Thomas B. Fernandez is the executor and the said Carlotta C. Fernandez is the executrix of the last will and testament of said B. Fernandez, deceased, and that the above-entitled action has not been prosecuted by the libellants with reasonable or any diligence or at all, that owing to the death of said B. Fernandez, the said executor and executrix will be unable to properly prepare for a defense to said action, and by reason of the laches of the [12] libellants in not bringing the said cause on for trial upon the exceptions to the libel, and having the said cause brought to an issue and tried, the estate of the said B. Fernandez will suffer great damage if said cause is not dismissed.

On the hearing of said motions, said Thomas B. Fernandez and said Carlotta C. Fernandez will read this notice of motion, the papers and files herein, and the affidavits of H. W. Hutton and Thomas B. Fernandez, copies of which are attached hereto and served herewith to the libellants above named and

to Messrs. Frank and Mansfield, their proctors.

Yours, etc.

H. W. HUTTON,

Proctor for Thomas B. Fernandez and Carlotta C.
Fernandez. [13]

[**Affidavit of H. W. Hutton.**]

[Title of Court and Cause.]

State of California,

City and County of San Francisco,—ss.

H. W. Hutton, being first duly sworn, deposes and says as follows:

I am an attorney at law and have been for many years last past; the libel in the above cause was filed in the above court on the 13th day of November, 1905, and process issued thereon.

Having some knowledge of the claim made by the libellants against the defendant in a conversation with him, the said defendant, I advised him to appear therein without service of process, and thereupon and on the 8th day of December, 1905, I served exceptions to the libel for and on behalf of said defendant upon Messrs. Frank & Mansfield, the proctors for the libellants; on the 8th day of said December, I filed the exceptions above mentioned with the clerk of this Court, and upon said day the defendant gave a bond for costs and paid the clerk a deposit of \$15.00; since that day nothing has been done in said cause. I have never at any time requested any delay or any postponement of any matters [14] connected with the said cause or in said cause, nor has the defendant requested any post-

ponement of any matter connected therewith.

H. W. HUTTON.

Subscribed and sworn to before me this 2d day of October, 1912.

[Seal]

L. H. ANDERSON,

Notary Public in and for the City and County of San Francisco, State of California. [15]

[Affidavit of Thomas B. Fernandez.]

[Title of Court and Cause.]

State of California,

County of Contra Costa,—ss.

Thomas B. Fernandez, being first duly sworn, deposes and says as follows:

B. Fernandez, the above-named defendant, died testate, in the county of Contra Costa, State of California, on the 12th day of May, 1912; he was a resident of said county at the time of his death and had been such resident for more than forty years prior thereto.

After his death, his last will and testament was presented with a proper petition to the Superior Court of the said State of California, in and for the said County of Contra Costa, for probate, and thereafter such proceedings were had in said court upon said will and petition, that on the 3d day of June, 1912, the said [16] Superior Court, by its order duly given and made, admitted the said will to probate, and appointed myself as the executor and Carlotta C. Fernandez as the executrix of the said last will and testament of the said B. Fernandez, deceased; that thereupon and upon the same day I

qualified as such executor, and the said Carlotta C. Fernandez qualified as such executrix, and I thereupon became, ever since have been and now am the regularly appointed, qualified and acting executor, and the said Carlotta C. Fernandez thereupon and on the said 3d day of June, 1912, became the regularly appointed, qualified and ever since has been and now is the executrix of the last will and testament of said B. Fernandez, deceased.

That neither myself nor the said executrix had any knowledge of the pendency of the above cause until some time ago after our appointment, when we were told by W. S. Tinning, Esquire, our attorney in the said estate, that he had been informed by a letter from Mr. H. W. Hutton that such a case was pending.

I have no knowledge of the facts of said case, nor do I know where the witnesses are, nor have I any knowledge or information upon which to prepare a defense thereto, my belief being that the whole of the facts and information necessary to prepare a defense to said action were in the possession of the defendant alone at the time of his death, and my belief is that the said executrix of said estate is similarly situated.

THOMAS B. FERNANDEZ.

Subscribed and sworn to before me this 7th day of October, 1912.

[Seal]

L. E. HART,
Notary Public in and for the County of Contra
Costa, State of California.

[Endorsed]: Filed Oct. 8, 1912. At 9 o'clock and 55 min. A. M. Jas. P. Brown, Clerk. By C. W. Calbreath, Deputy Clerk. [17]

**[Order of Submission of Motions for Substitution
and to Dismiss.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 14th day of October, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 13,495.

STERN et al.

vs.

FERNANDEZ.

The motion to substitute defendants and to dismiss this proceeding this day came on for hearing, H. W. Hutton, Esqr., appearing for respondent, and N. A. Frank, Esqr., opposing, and after hearing counsel, by the Court ordered that said motions stand submitted. [18]

**[Opinion on Motion for Substitution of Parties
Respondent and on Motion to Dismiss Libel.]**

[Title of Court and Cause.]

NATHAN H. FRANK and IRVING H.

FRANK, Proctors for Libelant.

H. W. HUTTON, Proctor for Respondent.

DE HAVEN, District Judge.

This is a motion to substitute the executors as defendants, in place of the original defendant, who is deceased, and then for a dismissal of the libel, upon the ground of the unreasonable delay of libelant in prosecuting the action. The delay on the part of the libelant has certainly been great, but in view of the fact that the defendant at all times prior to the date of his decease on May 12, 1912, had the right to put an end to the delay by himself noticing the cause for hearing, he must be deemed to have acquiesced in such delay, and under the rule declared in the case of "*The Mariel*," 6 Fed. Rep. 831, his *representative are* not entitled to have the libel dismissed for want of prosecution. [19]

THE MOTION FOR SUBSTITUTION WILL BE GRANTED, and that for the DISMISSAL OF THE LIBEL WILL BE DENIED.

The hearing upon the exceptions to the libel will be set for Monday, November the 11th, 1912.

[Endorsed]: Filed Nov. 8th, 1912. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[20]

[Title of Court and Cause.]

Notice of Hearing of Exceptions to Libel.

To the Respondent Above Named, and to H. W. Hutton, Esq., Proctor for Respondent:

PLEASE TAKE NOTICE, that the exceptions to the libel on file in the above-entitled cause have been set down for hearing for Friday, the 11th day of October, 1912, at the hour of 10 o'clock, A. M. of said day.

Dated October 7, 1912.

FRANK & MANSFIELD,
NATHAN H. FRANK,
IRVING H. FRANK,

Proctors for Libelant. [21]

The within Notice of Hearing Exceptions to Libel served upon H. W. Hutton, at his office, Pacific Bldg., San Francisco, this 7th day of Oct. 1912, by leaving a copy thereof at the office of said H. W. Hutton.

IRVING H. FRANK,
Attorney for Respondent.

[Endorsed]: Filed Oct. 9, 1912. Jas. P. Brown, Clerk. By C. W. Calbreath, Deputy Clerk. [22]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the Court-room thereof, in the City and County of San Francisco, on Monday, the 11th day of Novem-

ber, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

#13,495.

STERN et al.

vs.

FERNANDEZ.

Order Overruling Exceptions to Libel.

The exceptions to the libel herein this day came on for hearing, and after hearing H. W. Hutton, Esq., in support thereof, and N. A. Frank, Esqr., in opposition thereto, by the Court ordered that said exceptions be, and the same are hereby overruled. Further ordered that defendant have 15 days to answer said libel. [23]

[Title of Court and Cause.]

Answer.

To the Honorable J. J. DE HAVEN, Judge of the Above-entitled Court:

The answer of Carlotta C. Fernandez, the executrix, and Thomas B. Fernandez, the executor of the last will and testament of Bernardo Fernandez, named in libellants' libel as B. Fernandez, to the libel of said libellants respectfully shows and alleges as follows:

I.

That Bernardo Fernandez, named in libellants' libel as B. Fernandez, died testate, in the county of Contra Costa, State of California, on or about the 12th day of May, 1912, of which county he was a resi-

dent at the time of his death, that thereafter said Carlotta C. Fernandez, and said Thomas B. Fernandez, offered the last will and testament of said Bernardo Fernandez to the Superior Court of the State of California, in and for the county of Contra Costa for probate, the said court being a court of competent jurisdiction, together with a petition praying that the said Carlotta C. Fernandez, be appointed the executrix, and the said Thomas B. Fernandez be appointed the executor of the said last will and testament of said deceased, they being named as such in said will; that thereafter such proceedings were had upon said will and petition that on the 3d day of June, 1912, the said will was by order of said Court duly given and made, admitted to [24] probate, and the said Carlotta C. Fernandez appointed the executrix, and the said Thomas B. Fernandez was appointed the executor thereof, and thereafter and on said day they each qualified in such capacities, and the said Carlotta C. Fernandez thereupon became, ever since has been, and now is the executrix, and the said Thomas B. Fernandez thereupon became, ever since has been, and now is the executor of the last will and testament of said Bernardo Fernandez, deceased.

II.

Answering unto the allegations and matter contained in the first article in libellants' libel contained, the said Carlotta C. and Thomas B. Fernandez, and each thereof, allege that they nor either thereof have any information, belief or knowledge upon any of said matters or allegations and they therefore call for

proof thereof, and basing the following denials upon want of information and belief, the said Carlotta C. and Thomas B. Fernandez, and each thereof, deny, that on the 17th day of October, 1904, or upon any other day, or at all, that the libellants or either thereof, shipped on board the schooner "Francis E. M. Barnard," or any other schooner, one thousand and eight or any sacks of beans or anything else, and upon like ground they and each thereof deny that on said or any other day the said schooner was lying in the Sacramento River, in the State of California, or that said schooner was bound to the Port of San Francisco, or elsewhere; upon like grounds they and each thereof deny that said beans or any other merchandise shipped by them was either in good order or well conditioned; upon like grounds they and each thereof deny that said beans or any thereof, or anything else, was to be carried to the port of San Francisco, or elsewhere, or delivered to the libellants, [25] or either thereof at said San Francisco, or elsewhere; upon like grounds they and each thereof deny that the said sacks of beans, or any thereof, or any merchandise was received by the master of said vessel on board thereof, or that the same or any thereof was received by anyone else on board of said vessel; upon like grounds they and each thereof deny that the said master of said vessel or anyone else either promised and agreed or promised or agreed to transport the said beans or any thereof, or any other merchandise, to the said port of San Francisco, or elsewhere, or to deliver the same or any thereof at said or any place, in like or any good order and con-

dition, or like or any good order or condition to said libellants or to anyone else, at said San Francisco, or elsewhere.

III.

Answering unto the allegations and matters contained in Article III of libellants' libel, the said Carlotta C. and Thomas B. Fernandez, and each thereof, allege that they nor either thereof have any knowledge, information or belief as to any of the matters contained in said article, and they therefore call for proof of said matters and allegations.

IV.

Further answering, the said Carlotta C. and Thomas B. Fernandez allege that they have neither information or belief sufficient to enable them or either thereof to answer the allegations contained in the III article in said libel contained, and basing their denials upon those grounds, they and each thereof deny that said schooner proceeded with said or any merchandise on board bound for said port of San Francisco, or elsewhere; they deny that libellants or either thereof were at all or any of the times mentioned in said libel, ready and willing, or ready or willing, to receive [26] said or any merchandise, or any thereof, in good or any order; they deny that said libellants, or either thereof, were ever ready to pay the freight on said or any merchandise; they deny that the master of said schooner did not deliver the said merchandise to libellants or either thereof; they deny that the said master did not deliver any part of said merchandise to libellants; they deny that owing to the unseaworthy condition of said vessel,

or the insufficient manning thereof, or to the negligence and carelessness or negligence or carelessness of said Bernardo Fernandez, that the said merchandise, or any thereof, was, on the 17th day of October, 1904, or upon any other day, or at all, either totally or partially lost and destroyed, or totally or partially lost or destroyed; upon like grounds they and each thereof deny that the libellants, or either thereof, by reason of any of the matters and things set forth in libellants' libel, have or did suffer damage in the sum of two thousand three hundred and *seven*-seven and 5/100 (2,377.05) dollars, or in any other sum, or any damage at all.

V.

That said Carlotta C. and Thomas B. Fernandez, and each thereof, further allege that they or either thereof have any knowledge, information or belief of the allegations and matters contained in Article IV of libellants' libel, and they and each thereof therefore call for proof of said allegations and matters.

VI.

They admit the jurisdiction of this Honorable Court in the premises, but they and each thereof deny that the premises contained in libellants' libel are true. [27]

VII.

Further answering said libel, the said Carlotta C. and Thomas B. Fernandez and each thereof allege, that as they are informed and believe, and on information and belief allege, that said schooner "Frances E. M. Bernard," on all of the dates and times in libellants' libel mentioned, was strong, tight, staunch,

well and properly found, and manned and loaded, and that the loss and damage mentioned in said libel, if any such loss and damage there was, occurred without the privity or fault of said Bernardo Fernandez, or of anyone in his employ, but was caused and occasioned solely by a peril of the sea, and an accident of navigation, and on like information and belief they and each allege that the said schooner "Frances E. M. Bernard" sank at some place unknown to them and each thereof, in some waters tributary to the Bay of San Francisco, on or about the dates and times mentioned in said libel; that at the time she so sank, and at the conclusion of such disaster, the value of said schooner, with her tackle, apparel and furniture, boats and sails, as she lay at the bottom of the waters in which she sank, did not exceed the sum of fifty (\$50.00) dollars, and there was no freight pending, and said Bernardo Fernandez never at any time received any freight for said voyage nor will these defendants ever receive any such freight.

VIII.

Further answering said libel, the said Carlotta C. and Thomas B. Fernandez, on their and each of their information and belief, allege that on all of the dates and times mentioned in libellants' libel, the said schooner "Frances E. M. Bernard" was in all respects seaworthy and properly manned, equipped, and supplied, and that the loss and damage mentioned in said [28] libel, if any such loss and damage there was, resulted from faults or errors in navigation of said vessel, or in the management of said vessel, or arose from dangers of the sea and the navi-

gable waters upon which said vessel was operated.

Wherefore, having fully answered, the said Carlotta C. and Thomas B. Fernandez, substituted defendants herein, as executrix and executor of the last will and testament of Bernardo Fernandez, deceased, pray that libellants' libel may be dismissed, with costs.

H. W. HUTTON,

Proctor for Respondents.

CARLOTTA C. FERNANDEZ.

THOMAS B. FERNANDEZ. [29]

State of California,

County of Contra Costa,—ss.

Thomas B. Fernandez, being first duly sworn, deposes and says as follows:

I am one of the substituted defendants in the above-entitled cause; I have read the foregoing answer and I know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated on information or belief, and as to those matters I believe it to be true.

THOMAS B. FERNANDEZ.

Subscribed and sworn to before me this 23d day of November, 1912.

[Seal]

L. E. HART,

Notary Public in and for the County of Contra Costa, State of California.

[Endorsed]: Filed Nov. 25, 1912. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [30]

**[Order Referring Cause to U. S. Commissioner to
Take Testimony.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 6th day of February, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable FRANK S. DIETRICH, Judge.

#13,495.

STERN & CO.

vs.

FERNANDEZ.

By the Court ordered that this cause be and the same is hereby referred to Francis Krull, U. S. Commissioner, to take the testimony that may be offered before him by the parties and report the same to this court. [31]

[Record of Hearing—Monday, September 22, 1913.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 22d day of September, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#13,495.

J. STERN & COMPANY

vs.

B. FERNANDEZ et al.

This cause, this day came on for hearing, N. A. Frank, Esqr., appearing for libellant, and H. W. Hutton, Esqr., appearing for respondent. Mr. Frank stated case and called Benedict Fleisher, who was duly sworn and examined on behalf of libelant. Mr. Hutton called B. H. Tiejien, P. H. Sommer, Thomas B. Fernandez, who were each duly sworn and examined as witnesses on behalf of respondents, and introduced in evidence the depositions taken before the United States Commissioner. Mr. Hutton recalled B. H. Tietjen. Mr. Frank called John Erickson, who was sworn and examined on behalf of libelant. The cause was then argued and submitted to the Court for decision. [32]

[Title of Court and Cause.]

Honorable MAURICE T. DOOLING, Judge.

Testimony Taken in Open Court.

Monday, September 22, 1913.

COUNSEL APPEARING:

For the Libelants: H. W. HUTTON, Esq.

For the Respondent: NATHAN H. FRANK,
Esq.**[Statement of Case by Mr. Nathan H. Frank,
Proctor for the Respondent.]**

Mr. FRANK.—This is an action for damages for

the loss of a cargo of beans shipped on the schooner "Francis E. M. Bernard" from a point on Miner Slough, near the Sacramento River, bound to San Francisco. The complaint alleges the shipping of the beans, the loss of the cargo and the damages.

The answer sets up the death of the respondent and the appointment of an executrix and executor. It also alleges ignorance of the allegations of the libel and sets up two separate defenses: First, what is known as the Harter Act, and the second, a limitation of liability under the statutes providing to that effect.

I desire at this time to ask permission to amend the libel by alleging the facts the same as in the answer, the [33] decease and the substitution of the executor and executrix, and also the presentation and rejection of the claim in this case. I presume there will be no objection to that.

Mr. HUTTON.—What is that?

Mr. FRANK.—The substitution.

Mr. HUTTON.—That has been granted.

Mr. FRANK.—I desire to make the proper allegation in the libel, and also the presentation and rejection of the claim.

Mr. HUTTON.—We would have the right to answer it, your Honor.

Mr. FRANK.—We will assume that it is denied, Mr. Hutton.

Mr. HUTTON.—I want to answer a libel. I don't want to answer a statement. I have a right to put in a proper written answer to the libel. The admission made may get in the record and it may

not. Of course, Mr. Frank has an absolute right to amend his libel. Amendments are made with great liberality in admiralty courts.

Mr. FRANK.—I have no objection to that.

The COURT.—Very well. Have you your amendment prepared?

Mr. FRANK.—I have not it prepared. I will file it later. The gentlemen is apprised of the matter.

The COURT.—The only new matter is the presentation of the claim.

Mr. FRANK.—Yes.

Mr. HUTTON.—I will state here—and I think we can agree on it, it may be agreed, so far as I am concerned, that the libelant did within proper time present a claim under the laws of the State of California to the executor and executrix and that it has been rejected practically by lapse of time.

Mr. FRANK.—That is all I want.

Mr. HUTTON.—And I suppose it may be admitted that the [34] original defendant, Bernardo Fernandez, is dead, and that the substituted defendants were regularly appointed executor and executrix of the last will, and that they are still such.

Mr. FRANK.—Yes, that is all right.

[Testimony of Benedict Fleischer, for Libelants.]

BENEDICT FLEISCHER, called for the libelants, sworn.

Mr. FRANK.—Q. You are one of the libelants in this case? A. Yes, sir.

Q. And a member of the firm of J. Stern & Co.?

A. Yes, sir.

Q. Do you remember the shipment of beans in

(Testimony of Benedict Fleischer.)

question on board the "Frances E. M. Bernard"?

A. I do.

Q. How many sacks of beans were placed on board the vessel?

A. 337 in one lot and 671 in another lot.

Q. Were those beans ever delivered by the vessel?

A. They were delivered on board of the vessel.

Q. I mean delivered by the vessel in San Francisco, the port of delivery? A. No, sir.

Q. Your information is that they were lost?

A. They were lost.

Q. What was the market value of those beans at that time, at the port of San Francisco?

A. We had them sold on the basis of bank delivery f. o. b. landing, \$2.35 per hundred.

Q. That is, that would have been their market price—by "bank" delivery you mean what?

A. At the shipping point.

The COURT.—What would that be at the point of delivery?

Mr. FRANK.—I assume the freight would be added. If we added the freight, we would have to subtract it anyhow because the respondent would be entitled to the freight; so that makes it net instead of going through that process. It would be worth more at the point of delivery than at the point of shipment. [35]

The COURT.—It might, well, be worth more but whether you can conclusively say it would be worth more or worth less—the point here is, that it was at the point of delivery.

(Testimony of Benedict Fleischer.)

Mr. FRANK.—Well, *prima facie* at any rate that would be the condition; it would be worth what it was worth there plus the cost of transportation.

Q. Was there a different market rate at San Francisco?

A. Yes, they were considerably higher in San Francisco.

Q. They were considerably higher?

A. Yes, sir.

Q. What was the value then in San Francisco?

A. About \$2.55, as near as I can recollect.

Q. You say per hundred; how many pounds were there in a sack?

A. They averaged about 85 pounds to the sack.

Q. 85 pounds to the sack? A. Yes, sir.

Mr. FRANK.—That is all. Take the witness.

Cross-examination.

Mr. HUTTON.—Q. Who is Mr. Stern?

A. Mr. Stern is my partner; he is here present.

Q. The firm of J. Stern & Company does not exist at this time, does it?

A. We have since incorporated. It still exists. The partnership does not exist any more. We incorporated since.

Q. All the claims of the partnership were assigned to the corporation?

A. No, sir; it was a partnership at that time.

Q. You did not see these beans loaded on the schooner, did you? A. I did not.

Q. Where were you at the time that you claim they were loaded?

(Testimony of Benedict Fleischer.)

A. I was in Rio Vista at the time.

Q. These beans were not loaded at Rio Vista?

A. They were not loaded at Rio Vista; no.

Q. What knowledge have you of the weights; you did not weigh them yourself, did you?

A. No, sir. [36]

Q. And you did not count the sacks yourself?

A. No, sir.

Q. You have no personal knowledge as to the weights that were in the sack, or that each sack contained, or the number of sacks? A. I have not.

Q. When you state that the value was such and such at the shipping point, what do you base that on?

A. We had them contracted at \$2.35, f. o. b. landing, on the basis of f. o. b. landing, to Erlanger & Gallinger, a firm that is out of business now.

Q. You did not raise these beans yourself, did you? A. No, sir.

Mr. HUTTON.—That is all. I do not think this witness has shown any knowledge—

Mr. FRANK.—One moment; we have not finished yet.

Redirect Examination.

Mr. FRANK.—Q. Did you receive a shipping receipt for those beans? A. Yes, sir.

Q. A shipping receipt from the vessel?

A. From the Japanese.

Q. But it was signed by the master of the vessel?

A. Yes, sir.

Q. And the weights you have given are those weights taken from those shipping receipts?

(Testimony of Benedict Fleischer.)

A. No, sir; we had to average them the same as other beans were weighed that season.

Q. I don't mean the weight; I mean the number of sacks?

A. The number of sacks were taken from the shipping receipts; yes, sir.

Q. And these papers that I hand you are what?

A. That is a receipt made out by me and signed by the Jap who sold the beans.

Q. At the time of the presentation of the shipping receipt? A. Yes.

Q. And the number of sacks correspond with the number of sacks [37] shown by the shipping receipts? A. Yes, sir.

Mr. HUTTON.—I will have to object to this, if your Honor please, on the ground that it is without foundation and that it is hearsay. It is not signed by anyone we are connected with, either by the master or by the defendant. They are simply signed by a Jap.

Mr. FRANK.—I am not offering it in evidence for that purpose; I am simply connecting up the number of sacks.

The COURT.—Q. Where are the shipping receipts?

A. The shipping receipts were lost in the fire; we sent them to Mr. Frank and they were lost.

Q. Who is this Jap who signed them, what connection did he have with the transaction?

A. He was farming and he sold us the beans; he was the owner of the beans before we bought them;

(Testimony of Benedict Fleischer.)

in other words, he raised the beans.

Mr. FRANK.—I offer these two receipts in evidence for the purpose of connecting them up with the bills of lading showing the number of sacks that were delivered on board, and for that purpose only.

Mr. HUTTON.—We object upon the ground that it is without foundation and hearsay and not binding on the defendants, the original defendants or the substituted defendants.

The COURT.—I think the objection will have to be sustained. The only purpose of them is to refresh his memory. He has testified that he had 337 sacks and 671 sacks. This would not add anything to it. It might subtract from the case after it was all over.

Mr. FRANK.—Well, I don't care particularly to offer these in evidence. I simply wish them for the purpose of refreshing the witness' memory and to show the connection between the shipping receipts. However, I withdraw it if that is your [38] Honor's ruling.

Mr. HUTTON.—A witness can only refresh his memory by a paper that is either made by himself or under his immediate direction. This paper was not made either way.

Mr. FRANK.—Yes, it was.

Q. Was that written by yourself, in your own handwriting? A. Yes, it was written by myself.

The COURT.—Q. You saw the shipping receipts, did you? A. Yes, sir.

Q. Did they correspond with the number of sacks

(Testimony of Benedict Fleischer.)

mentioned here? A. Yes, sir.

Mr. HUTTON.—I object to the shipping receipt upon the ground that there is no proof here that they were ever signed by the master of the vessel.

The COURT.—He says they were, and that they were lost, that they were burned up.

Mr. FRANK.—That is all.

Recross-examination.

Mr. HUTTON.—Q. Did you ever see the master of the vessel sign any shipping receipt?

A. No, sir.

Q. And all you know is you got a paper with the name on it that someone told you was the name of the master of the vessel? A. Well, we always—

Q. (Intg.) I am not asking you about always, I am asking you about the shipping receipt. I will ask you, how did you get that shipping receipt that you say was burned?

A. The Japanese brought it in and he got his money.

Q. Brought it in where?

A. In our store at Rio Vista.

Q. And that was the first time you saw it?

A. That was the first time I saw it. [39]

Q. Was it kept with these two papers that you looked at awhile ago? A. No, sir.

Q. Where was it taken to?

A. The shipping receipt?

Q. Yes. A. I mailed them to San Francisco.

Mr. HUTTON.—I move to strike out all the tes-

timony of the witness relating to this shipping receipt or alleged shipping receipt upon the ground that no connection is shown between it and the defendant.

The COURT.—The motion will be denied.

Mr. HUTTON.—That is all.

Mr. FRANK.—That is our *prima facie* case, your Honor.

The COURT.—Is that your case, Mr. Frank?

Mr. FRANK.—That is our *prima facie* case.

[Testimony of B. H. Tietjan, for Respondent.]

B. H. TIETJAN, called for the respondent, sworn.

Mr. HUTTON.—Our defense in this case, if your Honor please, assuming that they have established the fact that the beans were received by the original defendant, is that if they were lost they were lost without fault of anyone, of course, our contention is that the libelant would have to show want of ordinary care. And again, if your Honor please, the Harter Act is pleaded. We contend that the vessel was tight, strong, sufficiently and properly manned and that that absolves the owner of the vessel by reason of errors of navigation that he is not a party to. Another defense is limitation of liability, and that if the beans were lost at all, they were lost without the fault or privity of the owner of the vessel at that time. [40]

Q. What is your occupation?

A. I am in the shipping business.

(Testimony of B. H. Tietjan.)

Q. How long have you been in the shipping business?

A. Well, I have been on the front here for 49 years.

Q. What is your present business?

A. I am handling vessels.

Q. Do you own any scows?

A. Yes; I have got four myself.

Q. Have you been in the scow business, carrying cargoes around San Francisco here, and on the Sacramento River?

A. Yes, sir.

Q. For how many years? A. Since 1867.

Q. Were you ever master on any of those scows?

A. Yes, sir.

Q. Deck-hand on any of them? A. Yes, sir.

Q. For how many years?

A. Well, I was master in 1868 and 1869, and then from 1872 up to the time I quit.

Q. Do you know the "Francis E. M. Bernard," or did you know her?

A. Yes, sir.

Q. How long did you know her?

A. I must have had her about 8 years or so.

Q. Had her, what do you mean by having her?

A. I was agent for Fernandez.

Q. You were agent for the vessel for 8 years; is that right?

A. Yes, sir.

Q. Do you remember the time that she left San Francisco to go to Rio Vista, some time about October, 1904?

A. Yes, sir.

Q. Who went out master on her? (Addressing Mr. Frank:) Have you any objection to my calling

(Testimony of B. H. Tietjan.)

his attention to the name?

Mr. FRANK.—No.

Mr. HUTTON.—Q. Paul Ewald? A. Yes, sir.

Q. Did he ever work for you?

A. Yes, sir, he worked for me for two years on the same vessel.

Q. Did he ever work after that?

A. Yes; he run the schooner "Rough-and-Ready" after that. [41]

Q. In what capacity? A. Captain.

Q. Was he a competent captain or was he not a competent captain?

A. Yes, sir, he was competent.

Q. A good man? A. Yes, sir, a good man.

Q. How did he compare with the average captain in that line of business?

A. He was a good average captain; he was not the best and he was not the poorest by a longshot.

Q. Who appointed him captain on that trip?

A. I did.

Q. What was the usual crew carried by the "Francis E. M. Bernard"? A. Two men.

Q. What do you mean by two men?

A. Captain and one man.

Q. How many years was she run that way?

A. As long as I had her.

Q. Was that enough for her? A. Yes, sir.

Q. A sufficient crew for that vessel?

A. Yes, sir.

Q. What condition was the vessel in at that time, the time she left to go to Rio Vista?

(Testimony of B. H. Tietjan.)

A. She was in good condition.

Q. What was the condition of her sails?

A. They were all right.

Q. Were they new or old?

A. I had a new mainsail and a new jib put in her.

Q. At that time? A. Yes, sir.

Q. How was her rigging?

A. Her rigging was good.

Q. And her hull?

A. Her hull was good; she had been on the ways in the spring; she had been on the ways every year. I always kept the vessel up.

Q. How long had she been on the ways prior to this trip?

A. I could not tell that; I don't remember everything just now, but she was on the ways every year.

Q. Can you remember about how long it was before this?

A. No, I could not, excepting that I had my books.
[42]

Q. What ways was she on?

A. On Anderson's ways. He has the books.

Q. Was there much work done on her then?

A. Yes, sir.

Q. Who superintended it? A. Mr. Anderson.

Q. Did you have anything to do with it?

A. I left it to him to do the work. I was out and looked at her two or three times, but Anderson superintended the work.

Q. When she left the ways on that occasion what was her condition?

(Testimony of B. H. Tietjan.)

A. She was in good condition.

Q. And you say she was in good condition when she started on that trip also?

A. Yes, sir, she went away with a load of lumber from Meiggs' Wharf.

Q. Did you collect any freight money for that trip—that is, for the beans? A. No, sir.

Q. You were never paid for the beans?

A. No, sir.

Q. What was the condition of her running-gear when she left San Francisco to go to Rio Vista?

A. The running-gear was good so far as I know. They could get whatever they wanted; whatever the captain ordered he always got it.

Q. Were you ever on board of her?

A. When she came from the ways I was on her, when they overhauled her.

Q. Take the "Francis E. M. Bernard" with a load of beans; say she had 900 sacks of beans on her—where would be a proper place to stow that vessel—those beans—if she was properly loaded?

A. Well, it is different on different kinds of vessels. She carries more on deck. She has a big beam and shallow. I had 50 tons of coal on her, 45 on deck, and she sailed up the river all right.

Q. Properly loaded that way? A. Yes, sir.

Q. Suppose she had 125 sacks of beans in the aft-hold and the [43] rest on deck, would she be properly loaded?

A. She would be properly loaded, enough to beat down on; she would be stiff enough to sail on.

(Testimony of B. H. Tietjan.)

Q. How do these scows and vessels engaged in the river trade usually carry their loads, where do they usually carry them, on what part of the ship?

A. Some in the hold and some on deck.

Q. Where is most of the load carried?

A. Most on deck, with scows.

Q. Then, for all practical purposes—that is, for the purposes of carrying that load, the load of beans from Rio Vista, or close to Rio Vista, to San Francisco, I will ask you whether the “Francis E. M. Bernard” would be properly loaded with 125 sacks of beans in the aft-hold and 775 sacks on the deck?

A. Yes, sir.

Cross-examination.

Mr. FRANK.—Q. These vessels that you have been speaking of as carrying deckloads are known as scow-schooners, are they not? A. Yes, sir.

Q. That is, they are square fore and aft, flat-bottom and straight sides? A. Yes, sir.

Q. The “Bernard” was not built that way, was she?

A. She was built flat on the bottom and a big beam.

Q. She was not built that way, was she?

A. No, she had a sharp bow.

Q. And she had a bilge-side?

A. She had a scag.

Q. And she carried a center-board, did she not?

A. Yes, sir.

Q. That is different from most of these vessels, is it not? A. It is a little different.

(Testimony of B. H. Tietjan.)

Q. It would make a difference in her stability too, would it not?

A. No, not in her, because she has so much beam and was shallow; if a vessel is deep—

Q. (Intg.) How deep was she?

A. I don't think she was more [44] than $3\frac{1}{2}$ hold.

Q. Are you sure of that?

A. I am almost sure it was $3\frac{1}{2}$.

Q. What are you basing that testimony on?

A. Well, I have been down in her many times.

Q. How long was she?

A. I could not tell you that.

Q. How wide was she?

A. She must have been 18 feet beam, I think.

Q. Well, do you know?

A. I am only making a guess at it; I don't know; she had a big beam and was shallow.

Q. Do you consider 18 feet a big beam for a 54-foot vessel?

A. Yes, according to the draught of the vessel; I have a vessel which takes everything on deck and nothing in the hold, and I have a vessel which takes half on deck and half in the hold.

Q. Vessels differ in that respect, do they?

A. Yes, sir.

Q. They are differently built?

A. Yes, sir, they are different in the beam and the depth.

Q. They differ with reference to their carrying capacity and the manner of loading, do they not? Each

(Testimony of B. H. Tietjan.)

vessel has its own peculiarities.

A. Well, according to the depth of a vessel and the beam, of course.

Q. That is the only thing you base your distinction upon? A. Yes, for stiffness.

Q. I say, the depth and the beam are the only things upon which you base your distinction upon between the manner of loading different vessels?

A. Yes, sir.

Q. You say she carried a cargo of coal for you once, with 45 tons on deck and 5 in the hold?

A. Yes, sir.

Q. When was that?

A. That was a long time ago.

Q. How long ago?

A. That must be 18 or 20 years ago.

Q. How do you happen to remember that detail now after 18 or 20 years?

A. Because I know I was down there when she took [45] it in and the captain said that he put 5 tons in the hold, and I said, "Is she stiff enough with that?" and he said, "Yes, she is stiff enough for sailing"; he said, "She is all right." I never sailed her myself.

Q. You never sailed her yourself? A. No.

Q. And you had nothing to do with the loading of her at this time? A. No, sir.

Q. All you know about it is that the captain told you she had 5 tons in the hold? A. Yes, sir.

Q. That is all you know about the transaction?

A. I was there when she took in 5 tons. I asked

(Testimony of B. H. Tietjan.)

him if that was all she required and he said yes.

Q. And you did not weigh any of the coal and you were not there to see any weight of it in the hold or on the deck?

A. I had the weight in the book; the bill came to me.

Q. The bill for the whole amount of coal?

A. Yes.

Mr. FRANK.—I am not taking the trouble to object to the testimony as it comes along, your Honor, or to move to strike it out. That has not been our practice. However, I desire to call your Honor's attention to this, that the objection to this testimony is that it is hearsay testimony.

Mr. HUTTON—I think that he said that he saw the coal in the hold and he asked the captain how much there was; the captain told him there was 5 tons. That is my recollection of it.

The COURT.—That is what he said.

Mr. FRANK.—That is right, and I think that is hearsay testimony as to the amount of coal that was in there.

Q. Upon this occasion where did she go with this coal?

A. She went somewhere up on the Stockton River. I do not remember exactly the place. [46]

Q. Of course, you did not go with her?

A. No, sir.

Q. And you don't know anything about the nature of the winds and the weather on that trip?

A. No, sir; I don't remember anything about that.

(Testimony of B. H. Tietjan.)

Q. And you do not know anything about how she acted or behaved? A. No.

Q. All you know is that she did not capsize?

A. She did not capsize. She came back all right.

Q. Did I understand you to say you never sailed her yourself? A. No, sir.

Q. And all you know about her is you have seen her lying alongside the dock here in San Francisco and you sent her off?

A. Well, I have been on her every time she has been on the ways.

Q. I mean so far as her navigation is concerned, you had nothing to do with her and never saw her and know nothing at all about her except you saw her lying alongside the dock in San Francisco?

A. No, sir, I had never been with her.

Q. Have you any other vessels in your employ that are sharp vessels, rounded with bilge, and center-board? A. No, sir.

Q. You never saw any other like that, did you?

A. Oh, yes, I have seen a good many of them.

Q. You never handled any?

A. No, not that I remember.

Q. With reference to this man who went as captain this time, was this the first time that you met him when he went as captain?

A. No, he was on the vessel.

Q. This was the first time he ever went as captain, was it not?

A. Yes; she was lying down at Meiggs' Wharf, and it was blowing, and the captain didn't show up,

(Testimony of B. H. Tietjan.)

and I told him to get a man and make the trip and I would make him captain when he came back. It was late in the evening, and it was blowing down there, [47] and I wanted him to get away from the wharf.

Q. I am not sure that I understood you. Who did you tell to get a man and you would make him captain?

A. I told the man who went captain on that trip; I told him to get a man and make trip and I would make him captain when he came back. It was late in the evening and it was blowing, and I said it would be all right when he came back.

Q. You had never known this man to act as captain of any vessel before?

A. Well, he was two years in the "Bernard."

Q. But he was there as a deck-hand, was he not?

A. Yes.

Q. And that is all?

A. I don't know that he was ever captain.

Q. You never made any inquiry about him at all? All you know is, you simply picked him up and told him to take her up there and that when he came back you would make him captain?

A. No, sir, he was on the vessel; if I didn't know he was competent I would not make him captain.

Q. How do you know he was competent?

A. The captain who was on the boat said he was a good man.

Q. That is, he was a good man in the position he was occupying on board of her?

A. He said he was a good man.

(Testimony of B. H. Tietjan.)

Q. That is all he said to you? A. That is all.

Q. How long was it before this occasion, when the captain told you he was a good man?

A. Oh, it might have been a year or six months.

Q. He was not recommending him then to be captain of the vessel?

A. No, I had no show to put him captain.

Q. He was the deck-hand on the vessel, and the captain in conversation with you said he was a good man; that is the substance of it? A. Yes.

Q. That is all there was to it? A. Yes.

Q. How many years ago was that—how many years ago was it that [48] you had that conversation?

A. I could not give you that out of my head.

Q. Was it 8 or 10 years ago?

A. I could not say. It was quite a while before the fire—I know that.

The COURT.—I thought he said it was a year or so before this trip?

Mr. FRANK.—A year or so before this trip.

Q. Why did not the old master take her on this occasion? A. Because he did not show up.

Mr. HUTTON.—I don't think that is material. The witness has already stated that it was blowing, and that the captain did not show up and so he told this man to get a man and go captain, and he would make him captain when he came back.

Mr. FRANK.—I did not catch that.

Q. The old master did not show up—is that the fact? A. Yes, sir.

(Testimony of B. H. Tietjan.)

Q. Then, as I understand you now, you had a master on board this vessel and you had this man as deck-hand? A. Yes, sir.

Q. And that it was blowing and that you wanted to get the vessel away and that the master did not show up? A. Yes.

Q. And so you told the deck-hand to get another man and to take the vessel out and when he came back you would make him master?

A. Yes. It was late in the evening. He was up in Rio Vista the next morning.

Redirect Examination.

Mr. HUTTON.—Q. What do you mean by making him master when he came back?

A. I would take him up to the Custom-house.

Q. Did you appoint him master for that trip?

A. Yes, sir, I appointed him master.

Q. You meant, then, that when he came back you would enter him in the Custom-house as master?

A. Yes, sir. [49]

Q. That is what you mean by saying you would make him master when he came back?

A. Yes, sir.

Q. Don't all scows have center-boards?

A. Yes, sir.

Q. Flat-bottom ones and square-bow ones, do they carry center-boards, as a usual thing?

A. Yes, and all sharp schooners on the bay, too, have center-boards, so far as I know; I don't know any tail ones except yachts.

Q. Do you know any that have not center-boards?

(Testimony of B. H. Tietjan.)

A. No, sir.

Q. How many have you come in contact with since you went into the business of operating and sailing scows?

A. I could not tell you that, but a good many.

Q. 100 or 500?

A. I have seen over 100 of them.

Q. Now, I will ask you this: during the eight years that you were the agent for the "Francis E. M. Bernard," was she operating all the time?

A. Yes, sir.

Q. Did you ever see her with loads on board of her?

A. Yes, sir.

Q. Often?

A. Yes, often. One time she went to Oakland with hay, and then I didn't see her so often.

Q. How many trips a month did she make?

A. She made six trips a month sometimes.

Q. Did you use to see her every time she came in?

A. No, not every time when she went to Oakland.

Q. About how many times a year would you see her with a load on board during the time you were agent of her? A. I would see her every month.

Q. And with respect to the way she carried the load that you saw on her, were they on deck or down below?

A. On deck. The hay—of course she had a load full of hay and would carry as much as she could. With barley, we would not fill the hold because it was hard to get at.

(Testimony of B. H. Tietjan.)

Q. Did you ever sail on a round-bottom schooner?
[50]

A. I was on one in 1867, the "Kid Blackstone."

Q. Did you sail on her yourself? A. Yes, sir.

Q. Was she anything like the "Bernard"?

A. Something like her, so far as I can remember;
it is a long time ago. We went with cement in her.

Q. How long after this trip was it that Ewald
went to work for you as master?

A. He had the "Winfield Scott" and the "Rough
and Ready" both; he had the two of them. He had
the "Winfield Scott" and he had the "Rough and
Ready."

Q. Captain on both of them?

A. Yes. He was on the Oakland long wharf when
that fire was over there, when the Frenchman was
burned. He was captain of her before that time.
He had the "Scott" before that.

Q. You had him captain with you for a couple of
years after the "Francis Bernard" matter, did you?

A. Yes; it must be something like that. He was
captain of a hay-scow after that.

[Testimony of P. H. Sommer, for Respondent.]

P. H. SOMMER, called for the respondent, sworn.

Mr. HUTTON.—Q. What is your business?

A. I am a master mariner, captain of a scow.

Q. And what has been your business?

A. That has been my business all the time.

Q. Have you been a ship-builder, a ship-carpenter?

A. No, sir, never.

Q. How long have you been captain of a scow?

(Testimony of P. H. Sommer.)

A. Since 1886.

Q. Were you deck-hand on scows before that?

A. Yes, from 1881.

Q. Do you own the scow that you are master of?

A. Yes.

Q. Own her yourself? A. Yes.

Q. Have you owned other vessels besides?

A. No. [51]

Q. How long have you owned her? A. 22 years.

Q. Do you remember being up in Cash Creek one time, when the "Francis Bernard" was at the bottom of the creek, or at the bottom of the river?

A. Yes, sir.

Q. Did you help to raise her? A. Yes, sir.

Q. You finally got her up? A. Yes.

Q. Do you know anything about the values of scows around the bay of San Francisco, what they are bought for and what they sell for?

A. Well, there is quite a difference between then and now.

Q. Well, at that time were you familiar with the price of vessels and what they were worth?

A. Well, yes, a little bit.

Q. With respect to the "Francis E. M. Bernard," you finally raised her, did you not? A. Yes, sir.

Q. When you got her up did you examine her at all?

A. I did not examine her but just what I seen of her.

Q. You saw a hole in her, did you not?

A. Yes, sir.

(Testimony of P. H. Sommer.)

Q. What was the condition of her planking there, was it sound or unsound? A. It was sound.

Q. What was the condition of her rigging and the hull generally, outside of the hole that was in her, was it good or bad?

A. It was in pretty good condition, so far as I can remember.

Q. In good condition? A. In good condition.

Q. What would you say was the value of the "Bernard" as she lay at the bottom of the river, before you did anything to her at all?

A. Well, I don't know, but I would not give much over \$300 for her.

Q. You think that would be a fair and reasonable value for her as she lay at the bottom of the river?

A. Yes, at the time she was at the bottom of the river. [52]

Q. That is, at the time of the accident?

A. Yes, sir.

Q. Do you know where she was finally taken to?

A. We had her alongside and we towed her up to Wood Island and she lay there.

Q. What was she, Captain, a good schooner or a bad schooner, generally considered, according to your knowledge of these things?

A. She was in pretty good condition as near as I can remember, the hull.

Q. Do you know how many days you got there after she sunk?

A. I got there the same night when she sunk.

Q. What do you carry on your vessel?

(Testimony of P. H. Sommer.)

A. I carry anything that comes along, hay, grain, beans, lumber, coal—anything.

Cross-examination.

Mr. FRANK.—Q. Captain, what do you think was a fair value of the “Bernard” at that time, before she sunk? A. Before she sunk?

A. Yes.

A. Well, I would consider about \$1,000—\$900 or \$1,000,—somewhere around that.

Q. That is all she would be worth?

A. That would be the value of her, yes; she may be worth more to some who would work for her, but I would say that at that time the value was about \$1,000, before she sunk.

Q. Do you know what it cost to raise her?

A. Well, I got \$50 for doing my share and the company got \$250. They towed her down here to the “Bernard’s” landing.

Q. They got \$250 for towing her down?

A. That is what I heard.

Q. You raised her and got \$50? A. Yes, sir.

Q. And after you raised her she was towed from there down to Pinole Point?

A. Down to Fernandez. [53]

Q. And for towing her down they got \$250?

A. That is what I heard.

Q. At any rate, the raising cost \$50?

A. Yes, sir.

Q. The hole that she had in her was nothing but a little hole that a man could probably just about get his hand in?

(Testimony of P. H. Sommer.)

A. That is all. It was on the port side by the fore-rigging.

Mr. HUTTON.—Q. How big was it?

A. There was just one plank bruised in a little.

Mr. FRANK.—Q. It would cost about \$50 to repair it?

Mr. HUTTON.—He could not tell that. He has not shown himself to be an expert.

Mr. FRANK.—Q. You have not got any idea?

A. Well, repair that for \$50—it would not cost that much to repair that hole.

Q. You have your own vessel and you know what it costs to repair things? A. Yes, sir.

Q. And that would not cost \$50?

A. It would not cost more than \$50.

Q. Why, then, do you value her at only \$300 when she was at the bottom?

A. Well, that was a kind of a hard proposition. I don't think I would give even that much. It is pretty hard to value a vessel at the bottom.

Q. She is worth at the bottom all she is worth at the surface less what it would cost to bring her up and repair her—is not that right?

A. Well, you may look at it that way. It is a hard proposition to value a vessel underneath the water.

Redirect Examination.

Mr. HUTTON.—Q. Captain, when a vessel sinks there is other work to do besides patching up a hole, is there not? A. Yes, a whole lot of things.

Q. How about her sails and her rigging and all those things, [54] they get out of order and need

(Testimony of P. H. Sommer.)

work, don't they, when a vessel sinks?

A. Yes, sir.

Recross-examination.

Mr. FRANK.—Q. She was only down three days; you got her up three days after she sunk, did you not?

A. I got her up on the second day, and I got her down to Wood Island and then I got relief.

Q. And after that they had to wash off the sails, did they not?

A. Well, everything was gone, the covers and everything else; she was bottom up.

Mr. HUTTON.—Q. You say she was bottom up?

A. Yes, she was bottom up. The masts were in the way; she was not just exactly right straight bottom up.

Q. Of course, that would affect her sails and rigging and all her cooking utensils?

A. Yes, and her lights; everything floated away.

Q. Then she was without hatches and without cooking utensils and the general paraphernalia on a vessel; is that right? A. That is right.

[Testimony of Thomas D. Fernandez, for Respondent.]

THOMAS D. FERNANDEZ, called for the respondent.

Mr. HUTTON.—Q. Has the "Francis E. M. Bernard" ever operated since the time of this accident?

A. No, sir, not to my knowledge.

Q. Do you remember the time of it?

A. I think it was in the fall of 1905.

Q. Did you see her after the accident?

(Testimony of Thomas D. Fernandez.)

A. I saw her when she was brought in to where she now lies.

Q. And she has been lying over at Pinole Point ever since? A. Yes, sir. [55]

Q. She is still there? A. Yes, sir.

Cross-examination.

Mr. FRANK.—Q. Why didn't you repair it?

Mr. HUTTON.—It was not his vessel.

Q. It was your father's vessel, was it?

A. Yes, sir.

Mr. FRANK.—Q. Why wasn't she repaired?

A. I don't know.

Q. She had no injury to her except this small hole, one plank broken in her bow, did she?

A. I did not go around her at all; I just saw her from the wharf.

Mr. HUTTON.—Your Honor, I have the testimony of the Master, Ewald; will I read it or file it?

The COURT.—I think you had better file it unless you want to call attention to some special portion of it.

Mr. HUTTON.—No, there is nothing I desire to call your Honor's attention to; it sets forth the character of the accident, how it happened, and the condition of the vessel.

The COURT.—Both counsel, no doubt, are familiar with the deposition.

Mr. FRANK.—I am familiar with it.

The COURT.—The Court will have to read it anyhow.

Mr. FRANK.—It is a short deposition and prob-

ably will aid your Honor somewhat in understanding the points that will be made in the argument if your Honor knows what is in the deposition.

The COURT.—Very well; you may read it.

Mr. HUTTON.—It is not exactly a deposition, if your Honor please. The case was on the calendar here for quite a number of days, a month, in fact, and the witnesses kept coming here and finally his Honor—I think it was Judge Bean—

Mr. FRANK.—Well, it does not make any difference about [56] that; it may be taken in the form of a deposition, or whatever it is; it is of the same value.

Mr. HUTTON.—Yes, of the same value. It reads as follows (reading).

**[Testimony of B. H. Tietjan, for Respondent
(Recalled).]**

B. H. TIETJAN, recalled for respondent:

Mr. HUTTON.—Q. How large around is a sack of beans, the diameter?

A. Well, I could not tell you exactly; it is not very big.

Q. How big?

A. Well, I would not make any estimate.

Q. You stated about the depth of the hold of the “Francis Bernard”; when the beans were three sacks high, how near would that come to filling up between the floor and the deck-beam?

A. Well, I don’t know exactly the size of a sack of beans.

Q. They are all about the same size?

A. I have not handled any myself.

(Deposition of B. H. Tietjan.)

Q. You never saw a sack of beans?

A. I have seen them but I don't remember—I would not know anything about the size of the sack.

Q. With respect to a scow or these river vessels, or any sailing vessel, when they get in the river where they are liable to get a puff of wind from among the trees, or around there, what effect does it have on them?

A. You have to manage them quick; sometimes you cannot do it, there is not room enough.

Q. Is not that the case with all sailing vessels, whether they are scow schooners or ocean vessels or anything else?

A. Yes, but especially on the Sacramento River because you have not much time there.

Q. Do you remember about where the main mast of the "Bernard" [57] set with reference to her length?

A. No, I could not tell exactly; it must be pretty near in the middle.

Q. And aft the main mast there is a hold and then comes the cabin; is that right? A. Yes, sir.

Q. Is there much of a hold forward of the main mast? A. Yes, quite a little hold.

Q. Now, I ask you with reference to 1,000 sacks of beans, Captain, 45 tons of beans; suppose 45 tons of beans weighed 85 lbs. to the sack, and there were 125 sacks down in the hold, from your experience with scows and your knowledge of the "Francis E. M. Bernard," would she be properly loaded that way?

A. Yes, she would be properly loaded to sail.

(Deposition of B. H. Tietjan.)

Cross-examination.

Mr. FRANK.—Q. Captain, of course a vessel answers her helm quickly or otherwise, according to the size of the rudder, does it not? You could hold those vessels up if you had a larger rudder on them, could you not?

A. Oh, that would depend upon the wind and upon the headway she got.

Q. If she has ordinary headway and is going along with the wind, there may be a wind over her, say three-quarters aft, and she had a good-sized rudder, you could hold her, could you not?

A. Yes, you could hold her with a rudder anyhow, if the rudder is large enough, if you have a good working boat.

Q. I don't want you to misunderstand what I am after; I am asking you this, and I understood you answered in the affirmative, but we will repeat it. If the rudder under those conditions is large enough you can hold her? A. If she don't jibe over.

Q. The sails did not jibe; we will leave that out.
[58]

A. If she has got headway she will steer.

Q. You ought to be able to hold her?

A. Yes, if she has got headway she will steer.

Mr. HUTTON.—Q. Supposing the wind changes quickly; Captain, can you always hold her then?

A. No; that is just where it comes in; when the wind is quick sometimes she comes back and jibes over quick.

Q. Did you ever see the rudder on the "Bernard"?

(Deposition of B. H. Tietjan.)

A. Yes.

Q. Was it large enough for her? A. Yes, sir.

Q. Was it a small rudder or a large rudder or an average rudder?

A. It was a good large rudder for her.

Q. I understand you to say that when the wind changes quick they jibe and when *the* jibe you cannot hold her?

A. It all depends upon the circumstances.

Q. I understand that. Where the sails do not jibe and the wind is well aft, she ought not to come up into the wind, ought she?

A. If she had headway enough to hold the helm, she has to mind the helm, but if she has not got much headway and a puff comes, then that is the time.

Q. But not when the wind is three-quarters aft?

A. It depends on the headway she has. If she has headway enough to feel it on the rudder she ought to mind the rudder.

Q. When she comes up to the wind is when she has the wind over her side, is it not?

A. On the quarter. If you get a puff of wind she will burst, too, if you don't beat her quick. Sometimes you have to let the main mast go.

Q. And sometimes you have to let the sheet go?

A. Yes.

Mr. HUTTON.—That is our case, your Honor.

[Testimony of John Erickson, for Libelants.]

JOHN ERICKSON, called for libelants, sworn.

Mr. FRANK.—Q. Captain, you are a seafaring man—you have been? A. Have been, yes, sir.

Q. What is your present occupation?

A. River freighting.

Q. Handling it by schooners? A. Yes, sir.

Q. How long have you been in that business?

A. About 21 years.

Q. Either during that time or previous to that time you yourself navigated these vessels on the river and on the bay?

A. No, I have not; my experience has been outside altogether.

Q. Going to sea in deep-sea vessels?

A. Yes, sir.

Q. In your business, during the last 21 years, in handling these schooners, have you attended to the loading of them yourself?

A. Well, of course, the captain attended to the loading of them; I do not.

Q. What part did you play in them so as to know that your vessels were properly laden?

A. I got the freight for them and then hired the captain to attend to the loading of them, and so on; of course, they have got experience and they know exactly what the vessel requires. Some vessels trim differently from others, but they have to get a little experience in the vessel to know that.

Q. That is, one vessel will trim differently from another vessel? A. Yes, sir.

(Testimony of John Erickson.)

Q. And you have to know the vessel in order to know how to trim her? A. Yes, sir.

Q. By knowing the vessel, I suppose you mean you have to have loaded her on previous occasions and see how they will sail? A. Yes, sir.

Q. Did you know the "Francis E. M. Bernard"?

A. Oh, yes, I have seen her, but I never was aboard of her. [60] I have seen her going by the dock, and so on, when she was running. It is a long time ago since she was put *on* of commission.

Q. You know what kind of a vessel she is?

A. Yes; a round-bottom schooner.

Q. Speaking generally, and from your information and knowledge in handling these vessels, would a round-bottom vessel of that sort be more tender than a flat-bottom vessel?

A. Well, it depends a good deal on how much beam they have. If they have plenty of beam they are pretty stiff but otherwise they would be cranky.

Q. You know the "Bernard," you know her beam?

A. I guess she was the same as the ordinary boats on the ways.

Q. From your knowledge of "Bernard" what would you say with reference to loading her with 5 tons under deck and 40 tons on deck, as to whether or not that is a proper means of loading the vessel?

A. $5\frac{1}{2}$ in the hold?

A. 5 tons or $5\frac{1}{2}$ in the hold and 40 tons on deck?

A. Well, it don't look to be hardly enough in the hold.

Q. You think that under those circumstances she

(Testimony of John Erickson.)

would be improperly loaded?

A. I would rule that she ought to have about one-third of it in the hold, or something like that. Of course some vessels are different from others.

Q. Well, you know this vessel, and we are speaking of this particular vessel now.

A. I have never been aboard her or sailed her or handled her and I could not tell, but according to my judgment I would think there was hardly enough in the hold.

Cross-examination.

Mr. HUTTON.—Q. Captain, do you know how long the “Bernard” was?

A. No, I have not looked up the length of her.

Q. Do you know how wide she was?

A. No, I do not know exactly. [61]

Q. Do you know how deep she was?

A. No, I have not looked up her dimensions at all.

Q. You never went aboard of her in your life, did you? A. No, I was not aboard of her.

Q. Most of these scows are built so as to carry the cargo on the deck, are they not?

A. Well, they carry a certain portion on deck; they carry about two-thirds on deck and about one-third in the hold. That is about the rule with them.

Q. That is, with some scows?

A. Most all of them.

Q. Some of them carry everything on the deck?

A. Some of them are built so they carry nothing in the hold. For instance, they are so shallow that they

(Testimony of John Erickson.)

put hardly anything in the hold, they carry it mostly on deck.

Q. A shallow vessel as a rule carries it almost all on the deck?

A. Yes, and because they are so built you cannot carry anything in the hold, because it is hard to get at it.

Q. What scows are you managing now?

A. I manage thirteen now.

Q. Give us the name of one of them.

A. The "Matilda" is the biggest one; another is the "Eppinger"; another is the "Port Costa"; another is the "Crockett."

Q. The "Matilda" has a deep hold? A. Yes.

Q. How deep is her hold? A. About 61½ feet.

Q. She would carry about one-third down below and two-thirds on deck?

A. No, she would carry more than that in the hold.

Q. How much would she carry?

A. About half and half.

Q. And the "Eppinger," how deep is she?

A. About the same.

Q. She would carry half and half? A. Yes, sir.

Q. Now, take one of the small ones; give us the name of a small one.

A. The "Ruby," a round boat, she [62] is built about the same as the "Bernard."

Q. Well, you don't know the "Bernard," you never were aboard of her?

A. Well, I looked at her.

Q. You saw her at a distance?

(Testimony of John Erickson.)

A. Going by alongside the wharf. I never was aboard of her to my knowledge.

Q. You have seen her lying alongside of the wharf, the same as any other vessel?

A. Well, she was built a good deal like the "Ruby."

Q. They all have center-boards, have they not?

A. Yes, sir. You cannot handle them without a center-board.

Q. You have carried beans, have you?

A. Oh, yes; we have carried lots of beans.

Q. How large is a sack of beans?

A. Not very large. They are a good deal smaller than a sack of barley.

Q. How large in diameter?

A. Oh, I don't know.

Q. A foot and a half?

A. About 2 cubic feet, or something like that.

Q. 2½ feet? A. Yes.

Q. In diameter, or in length, do you mean?

A. By measurement.

Q. I mean in diameter; take a sack of beans; how large is it in diameter? Is it as big as that globe up there? A. It is a little bigger than that.

Q. That is about 15 inches; will you say a sack of beans is 18 inches in diameter?

A. Well, about 15 or 16 inches.

Q. If you piled three tiers of beans, three sacks of beans on top of one another in the hold 3 feet deep you would have the hold pretty nearly filled up, would you not?

A. I think she would take 5—no, she would not either.

(Testimony of John Erickson.)

Q. If you take 3 sacks of beans in a hold 3 feet deep, you have the hold filled up?

A. Between 3 and 4 would fill her up.

Q. You could not get the fourth in, could you?
[63]

A. You could forward but not aft. The vessel is a little higher forward.

Q. You have the hold practically full, then have you not? A. Yes, sir.

Redirect Examination.

Mr. FRANK.—Q. What is the depth of the hold in the “Ruby”?

A. She is a deeper vessel, she is about 5 feet deep, or 5½ feet. She was built on to, raised 10 inches; she was shallow before but we raised her 10 inches.

Q. Assuming that the “Bernard” had a 4-foot hold, 18-foot beam, and 45 to 50 feet in length, would your idea of the manner of loading, if applied to a vessel of that size, that she should have one-third underneath, would that be your idea?

A. If they have not got a full load they would be stiff. They would be cranky when you got a full load on, but if they have less than a full load they will be stiff. If you load them deep and there is not sufficient in the hold it will make them cranky.

Q. What do you mean by a full load?

A. To load her down to the loading capacity.

Q. If her hold is not full, although she may be in one place loaded up to the deck, she is loaded fore and aft full, and then with 40 tons on deck, do you think a vessel of that size would be cranky?

(Testimony of John Erickson.)

Mr. HUTTON.—I think that is leading, your Honor.

Mr. FRANK.—Yes, I think it is myself.

Mr. HUTTON.—He says he never was aboard the “Bernard”; he never sailed her; I don’t think his testimony is of much value.

The COURT.—The question is leading.

Mr. FRANK.—Q. Would your testimony regarding your idea [64] of the proper or improper method of loading the “Bernard” be changed if you were told that her hold was 4 feet deep, and her deck-beam 18 feet, and her length 45 to 50 feet, make any difference in your testimony?

A. How many tons did she have aboard her?

Q. The same has already been put to you; 45 tons.

A. The capacity of that vessel fully loaded, how much did she carry?

Q. I could not tell you because she was not loaded.

A. Well, of course that would make a difference. I think, though, that in my judgment she ought to have a little more in the hold, but she may be stiff without it; I don’t know the vessel exactly enough for that.

Q. I thought you told me the other day, Captain, you knew the vessel?

A. I knew the vessel by sight, but I was never aboard of her.

Q. You have known her up and down the bay for years?

A. Oh, yes. She was principally in the hay busi-

(Testimony of John Erickson.)

ness. She was running hay for Bernard most of the time.

Mr. HUTTON.—Q. Now, Captain, is not this a fact, that as a rule captains may disagree on the way to load a vessel, one man may think it is all right loaded a certain way, and another fellow may think it ought to be a little different; it is largely a matter of opinion, is it not—that is right, is it not?

A. Yes, sir.

Q. A man who has been on a vessel for two years, you would naturally think he knew more about it than you would; that is right, is it not?

A. Of course, the longer a man is on the vessel the more he would know about her.

Mr. FRANK.—Q. If a man had nothing to do with loading the vessel before, but was only deck-hand, cook, and bottle-washer, [65] you would not place very much reliance on his judgment, would you, after two years of that experience?

Mr. HUTTON.—The man has to start as captain some time. According to your theory, unless a man has been captain for five years, he is incompetent prior to that time.

A. If a man is a long time in a vessel he ought to know from his experience just what she is able to carry.

Mr. FRANK.—Mr. Reporter, will you please read the question to the witness?

(Question read by the Reporter.)

A. No, because some men don't take much notice.

Q. They have no responsibility with respect to the

(Testimony of John Erickson.)

loading and therefore they have no knowledge concerning it; is not that the basis of it?

Mr. HUTTON.—That is leading and immaterial.

Mr. FRANK.—I withdraw that. I will address that argument to your Honor when we come to argue the case. That is all.

(Thereupon the cause was argued and submitted.)

[Endorsed]: Filed Feb. 26, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [66]

[Title of Court and Cause.]

Honorable MAURICE T. DOOLING, Judge.

Saturday, November 1st, 1913.

REPORTER'S TRANSCRIPT.

INDEX.

Direct Cross Re-D. Re-X

C. H. TIETJEN (recalled). 35 36 37 38
[67]

Saturday, November 1, 1913.

[Testimony of C. H. Tietjen, for Defendant
(Recalled).]

C. H. TIETJEN recalled for defendant:

Mr. HUTTON.—Q. Have you had any experience in vessels such as the "Francis E. M. Bernard" and vessels engaged in that trade having holes punctured in their side below the water-line? A. Yes, sir.

Q. Has your experience been to any extent?

A. Well, I have had five myself that have been sunk, capsized.

Q. What effect has the puncture of a hole in the

(Testimony of C. H. Tietjen.)

side of a vessel, such as the "Francis E. M. Bernard," some 5 or 6 inches below the water-line, a hole the size of an ordinary person's hand?

A. They usually get full of water on that side and capsize on that side; they always capsize on the side the hole is and where the water runs in.

Q. Does it make any difference whether the vessel is loaded with cargo or whether she is not loaded with cargo?

A. No. The water gets on one side and they will capsize. If they are square vessels the air will keep them up, so long as they are kept tight—when the air goes out they sink.

Q. Do you know of many instances of vessels, other than your own, that have acted in this way, in particular trade, vessels that have run on snags in the Sacramento River or in any other river?

A. I had one of them with a load of hay in and she ran into a snag but she did not capsize; we ran her over on the flat; she was battened down so that she could not capsize and we had another schooner there that pulled her on to the flat before she capsized. But the hold got full of water and spoiled the hay. [68]

Q. In cases where something had happened your own vessels, with respect to getting a hole below the water-line.

A. I had five of them capsize, one over at Alcatraz, one at Mission Street, one at Beale Street, one at the Union Street and another one at Howard,

(Testimony of C. H. Tietjen.)

capsized on the beam end. Three of them were in a blow.

Q. I mean when they get holes in their sides; that is what I have reference to.

A. Two of them, a steamer ran into them and they filled with water and capsized; they laid on the beam, the air kept them up.

Q. Then, according to your experience, is the natural effect of a hole below the water-line such as to cause a vessel to capsize?

A. Yes, if the water runs to that side it capsizes easily.

Cross-examination.

Mr. FRANK.—Q. I understand you are testifying now from your experience with reference to five of your vessels; is that right?

A. Yes, my vessels, and what I have seen on the front I have not mentioned. I have not mentioned what I have seen on the front.

Q. Of these vessels I understand that three of them did not have holes in them, but they were capsized by the wind, by the blow?

A. Yes. They got water in them and capsized.

Q. That is, you mean that the storm turned them over?

A. Yes; well, they got water in them; they filled with water and capsized on the beam. They never capsized from the storm; we were tied up alongside of the wharf.

Q. Well, how did they fill with water? Did they fill over the top?

(Testimony of C. H. Tietjen.)

A. Yes. One of them got a pile through the bottom at Union Street. [69]

Q. Let us speak of the three you have mentioned. They got water in the top and they were sunken clear down to the water level so that the water run flush with the deck, did it?

A. She was loaded flush with the deck, loaded with coal.

Q. And then they filled with water and capsized?

A. When you get water in them they capsize on the beam.

Q. Now, of the other two, you say one was on Union Street?

A. Yes; she hung on a pile there and it put a hole in her and capsized.

Q. How big a hole?

A. It was not big; it was about 2 inches on one side, 2 inches between the two timbers.

Q. That hole was in her bottom, was it?

A. Yes, sir.

Q. Right up from below? A. Yes, sir.

Q. How long after she struck the snag was it before she capsized?

A. I was not on board of her at the time; there were two men on board of her at the time.

Q. You don't know anything about it except what was told you, do you?

A. I know when I hauled her on to the ways, to straighten her up.

Q. And is that the same about the other three, you were not present, and it is only what somebody told

(Testimony of C. H. Tietjen.)

you about it? A. I seen them myself.

Q. You saw them go over?

A. Yes. The one I had in Stockton, a steamer ran into her stern; she went down stern first, the stern took the botton before the bow went down; she went down straight; she had 12 feet of water.

Q. She had a large hole in her stern?

A. Well, not a large hole; she opened right where the planking gets to the stern, she opened that much (indicating), the size of my hand; she went down in 3 minutes. [70]

Q. She was full of water before she capsized?

A. She did not capsize at all; she went down straight; she went down stem first.

Q. Did you have any others that capsized?

A. Yes.

Q. What was the other one? A. The "Edna".

Q. You have mentioned five here, "Alcatraz," "Beale," "Mission," "Union" and "Howard," three of which were blown over and one hung on a pile; what was the other?

A. The other was tied up alongside the wharf; nobody was on board of her. She got water in her. There was a crack in her, the water came in and she capsized.

Q. All of these were full before they capsized, were they?

A. Well, not full exactly, but they capsized.

Q. Can you tell us about how much water they had?

(Testimony of C. H. Tietjen.)

A. I don't know just how much water she had in her.

Q. These vessels were practically full of water before they capsized though, were they not?

A. Yes, certainly they were; they were full enough to sink; there need not be much to sink them.

Q. Your idea is that when they get a hole in them and get water in them they will capsize toward the side where the hole is, if the water capsizes them?

A. Yes, sir. I never saw a vessel capsize without she gets water in her. I am always *ascared* of any vessel leaking and getting water in her. You have to keep the water out.

Q. But when the water will cause her to capsize, she will capsize towards the side where the hole is in her?

A. Yes, sir, that is my experience.

Redirect Examination.

Mr. HUTTON.—Q. Suppose the wind is on the other side, on the [71] side of the vessel where the hole is, and she has a list the other way, what effect will that have?

A. The water will run over to that side.

Q. Which side will she capsize on then?

A. She will capsize where the water is.

Q. That is, if she is listed and the water is away from the hole, that is the side she is most likely to capsize on?

A. She will capsize on the side where the water is.

Recross-examination.

Mr. FRANK.—Q. If a vessel is going as this ves-

(Testimony of C. H. Tietjen.)

sel was going and strikes on the bank, for instance, so that the hole then is about 6 inches below her water-line, and then she sheers off and goes in the other direction, she will list, will she not, in the other direction? She will list toward the side where her sails are, would she not? A. Yes.

Q. And carry the hole out of the water, will it not?

A. Yes, it will carry the hole out of the water.

Q. So that in order for this vessel to capsize by reason of the water going in, that water would have had to have gone in her instantly, would it not?

A. Well, she would not capsize unless she had enough of it.

Q. It would have to go in instantly because the moment she struck she sheered and the sheer would throw her on the other side and throw the hole out of the water, would it not?

A. If it threw the hole out of the water she would not leak any more.

Mr. HUTTON.—Q. But you don't undertake to say that the hole was out of the water, do you?

A. No, of course not.

Q. In fact, Captain, the "Francis E. M. Bernard" would not capsize [72] loaded as she was without she got water in her, would she?

A. No, sir. She had good beams and she was stiff.

Mr. FRANK.—Q. You don't know how she was loaded, do you?

A. I know she was loaded. I know she was stiff. I can bring the man up here who built her; she was built in 1865.

(Testimony of C. H. Tietjen.)

Q. When I asked you about her coming out of the water I don't want you to understand that I am asking you for something other than the facts as they appear here. This is what I want to call your attention to; the captain testifies that she struck the bank and that immediately that she struck the bank she sheered off and *when* over on the other side and capsized; he says she capsized immediately and I think he limits the time to about 5 minutes. Now, the moment she sheered off she would come up on the side where she struck the bank, would she not?

A. She could sheer off and capsize at the same time.

Q. Yes, she could do that, but the moment she struck the bank and began to sheer off she would come up on that side of the water, would she not?

A. No. If the wind was anywhere fair she will glance off the bank and go into the middle of the river.

Q. She had the wind on the other side, on the off side?

A. No. He told me he had a norther, and if he had a norther that would be a fair wind. Of course I was not there but I am talking according to my experience. I was there enough to know that.

The COURT.—Q. Do you know of any of these scows, Captain, to lose their deck-load without capsizing?

A. I don't know one of them capsizing without getting water.

Q. That is not the question I asked you. Do you

(Testimony of C. H. Tietjen.)

know any of them ever to get such a list as to lose the deck-load without capsizing? [73]

A. No. They capsize on the beam. They put the mast in the water. A square scow will float like a buoy. A round bottom one generally turns bottom up because they have not the same show. The mast is so heavy it turns over that way and the air from the bottom turns them bottom up.

Q. Was this a round bottom boat?

A. She had round bilges; she is very shallow and very beamy.

Mr. HUTTON.—Q. When a vessel situated as the “Francis E. M. Bernard” strikes on the bank and sheers off, as soon as she sheers away from the bank she rights herself, does she not, if she has listed when she struck the bank?

A. She will sheer right out into the stream. If a square bottom one strikes the bank she is stuck right there because she stays on the bank, but a round bottom boat glances off and swings out. A square one will generally strike on the corner and will stay there. A round bottom one generally gives a glancing blow and gets out.

[Endorsed]: Filed Feb. 26, 1014. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [74]

[Title of Court and Cause.]

**Testimony Taken Before United States
Commissioner.**

WEDNESDAY, MARCH 26th, 1913.

APPEARANCES:

NATHAN H. FRANK, Esq., for the Libellant.

H. W. HUTTON, Esq., for the Respondent. [75]

[Testimony of Paul Ewald, for Respondent.]

PAUL EWALD, called for the respondent, sworn.

Mr. HUTTON.—Q. What is your name?

A. Paul Ewald.

Q. How old are you? A. 36.

Q. What is your occupation?

A. Sailor; seaman.

Q. Where are you working now?

A. Government.

Q. On what vessel? A. Steamer "L. Aguador."

Q. Where does she run?

A. Well, she only runs in the bay to different forts and posts.

Q. How long have you been on her?

A. Going on a year this coming May; the 27th of May last year I went there.

Q. How long have you been going to sea?

A. Since I was 15 years old.

Q. How long have you been going to sea around San Francisco?

A. Well, I have been sailing ever since I came out here, 1895; I have been sailing ever since.

Q. Captain, on any scows?

(Testimony of Paul Ewald.)

A. Yes, sir, on four of them.

Q. What ones? A. "Bernard."

Q. When you say the "Bernard," give the full name.

A. "Rough and Ready," "Winfield Scott," and "Maggie Hartman."

Q. When you say the "Bernard" do you mean the "Francis E. M. Bernard"?

A. That is the one.

Q. How long were you on the "Francis E. M. Bernard"? How long were you on her altogether?

A. Two years and a half.

Q. Do you remember the time that she sunk or got water-logged on the Sacramento River—on some tributary to the Sacramento River?

A. Well, it was in Cache Creek.

Q. What kind of a cargo did she have on her at that time? A. She had a lot of beans on her.

Q. How much beans?

A. 900 sacks, 45 tons supposed [76] to be.

Q. Where did you get the beans?

A. Miner Slough.

Q. What place?

A. Well, the first place I don't remember—it is Stollman or something like that; but I know the second place, Totman's. We had 450 sacks of beans from the upper place and 450 the other remainder from Totman's.

Q. Where were they loaded on the vessel; that is, in what parts of the vessel were they put?

A. Well, I put 125 sacks down in the after-hold

(Testimony of Paul Ewald.)

and the remainder on deck.

Q. Was she loaded properly at that time?

A. She was. She was in good trim.

Q. The usual way of loading cargo of that kind?

A. Exactly.

Q. And at that time?

Mr. FRANK.—We will not have an opportunity of having this before the Court, and I suggest that you do not lead the witness.

Mr. HUTTON.—Q. After you loaded the last part of those beans where did you go to?

A. Well, we set sail Monday morning. We pulled across the river and there was a westerly wind blowing. We set the mainsail and jib and we started off for home and I told the man to go forward and hoist the foresail, and a puff of wind came up from the northwest—the winds are pretty uncertain up the river. I had the helm hard down and she sheered and went into the bank there and struck a snag there or a rut and she made a hole in her starboard bow.

Q. What was the result?

A. It was no one's fault.

Q. What was the result of the hold in her?

A. The snag [77] was sticking out from the bank.

Q. What effect did that have on the ship?

A. It stove in the planking between the ribs.

Q. What happened?

A. We sheered her off and I noticed she acted funny and I tried to get on the other side but before we got there she turned over.

(Testimony of Paul Ewald.)

Q. What made her turn over?

A. The water got in the hold.

Q. She filled with water?

A. She filled with water and capsized.

Q. How was she before that, tight?

A. In good condition, she was only fixed up. Mr. Fernandez kept the boat in good shape.

Q. At the time you got the last part of those beans on what was the condition of her rigging, good or bad?

A. The condition was good; the boat was in good condition.

Q. What was the condition of her sails?

A. Good.

Q. And the hull? A. The hull was good.

Q. Where were you going to take those beans to?

A. They were going to the seawall to some party consigned—I don't know the consigner of the beans.

Q. The seawall where? A. Section two.

Q. What city, what place? A. San Francisco.

Q. Now, at the time you started on that trip, Captain, after you had loaded the beans just state the general condition of the hull and the rigging and the sails.

A. Well, the hull was in good condition, she was only lately fitted out on Anderson's ways.

Q. Did she leak any?

A. No, sir, she did not leak. The sails and the rigging were perfectly good in that boat. [78]

Q. Now, where had you left to go up the river? Did you leave San Francisco or some other place to

(Testimony of Paul Ewald.)

get up where you were?

A. We left San Francisco here with a lot of posts.

Q. Where for?

A. Rio Vista. We left here on Friday afternoon. We got to Rio Vista Saturday morning.

Q. What kind of a crew did she have on when she left San Francisco. How many men?

A. Two men.

Q. Who were the two?

A. The man I hired the day before and myself.

Q. What were you on her?

A. I was master of the boat.

Q. How many men did she usually carry? How many men did she usually carry while you were in her altogether? A. Only two all the time.

Q. During the two years you were on her?

A. Always two men.

Q. During that period of time that you were on her prior to this trip where did she run?

A. All over the place here. We used to go up the river, Sacramento River, San Joaquin River, up to Fernandez, like all the scows running in the bay; all over the country.

Q. Was she running in the same water at the time of this accident? A. The same waters.

Q. The same number of crew? A. Yes, sir.

Q. When she left San Francisco with a load of posts what was the condition of the vessel?

A. She was in good shape. The captain's name was Ed. Murrel before me.

Q. Did she leak any? A. No, sir.

(Testimony of Paul Ewald.)

Q. Tight? A. She was tight.

Q. What was the condition of her hull as to strength? A. Do you mean the planking? [79]

Q. Yes.

A. The planking is three inches; 2½ inches, I believe.

Q. What I meant, was she a strong boat or a weak boat?

A. She is always considered a strong boat for her size.

Q. What was the condition of her rigging and sails?

A. The rigging was good, real good wire rigging. The masts were good and firm and the sails were good.

Q. How wide a place was it there where she struck this snag?

A. Cache Creek is about 150 feet wide; from 150 to 175 feet.

Q. When she struck at that time did she strike a very hard blow?

A. Well, we was sailing pretty nicely with a leading wind and of course as soon as the wind hauled from the northwest it filled the mainsail and she took a sheer right into the bank although I had her helm hard down.

Q. Why did you have her helm hard down.

A. To sheer her off; I could see she was going to windward. I put her hard down.

Q. What I mean is did she strike a very hard blow?

(Testimony of Paul Ewald.)

A. She struck a glacing blow and then she sheered off.

Q. You say she keeled over; did she turn completely over?

A. After she struck I know she acted funny right away and I says to this man there must be something the matter with her. He says, "I cannot see nothing the matter with her." I tried to get her across the river to see what the trouble was with the boat and before we got halfway she turned turtle and I had just time enough to lower down the mainsail, fore-sail, and the jib. Of course, at that time the man and I was overboard; the deck-load shifted, the beans shifted, dumped over in the water. Of course, we was spilled into the water and the man [80] and I, we swam for the shore.

Q. I will ask you this; from your experience as a marine man was there anything you could have done at that time to avoid the accident?

A. It could not have been avoided. Them scows more or less sometimes they will act very contrary. You can have your helm hard up and hard down and they will act contrary.

Q. How is the wind on that creek—will it blow steadily?

A. No, sir; the winds are pretty uncertain. You get amongst a bunch of trees and a puff of wind comes up and all at once it is calm again. You will always have to be on the alert.

Q. This is a sailing vessel? A. Yes, sir.

Q. Is not any sailing vessel liable to act contrary

(Testimony of Paul Ewald.)

when the wind changes suddenly?

A. They will act contrary when the wind changes.

Q. I will ask you this: How is it with any sailing vessel when the wind changes suddenly, or comes in puffs such as you got on that morning?

A. Well, we went out and I told the man to slack—

Q. (Intg.) That is not the question. Read the question, Mr. Reporter.

(The Reporter reads the question.) How are they liable to act?

A. Some of them will pay off, some of them will luff up to the wind.

Q. What did the "Francis E. M. Bernard" do that morning, pay off or luff up.

A. She luffed up she went right to windward.

Q. How long had you had your mainsail set at the time that she struck the bank?

A. About half an hour.

Q. And you had been setting your foresail?

A. Yes, sir, [81] setting the foresail.

Mr. HUTTON.—I think that is all.

Cross-examination.

Mr. FRANK.—Q. Now, Mr. Ewald, did you make any memorandum of the amount of beans that you took on board? A. No, sir, I did not.

Q. When you say 900 or 960 sacks you are only attempting to approximate the amount?

A. Approximate; it is supposed to be 45 tons and 45 tons make about 900 sacks.

Q. Now, I show you here a receipt. Do you know this man Siguno? A. No, sir, I do not know that.

(Testimony of Paul Ewald.)

Q. A Jap? A. No, sir.

Q. Do you remember getting 671 sacks from one lot? A. That might have been possible.

Q. And 337 from another lot?

A. I don't know the lots, sir. I made no memorandum of the sacks I got. We loaded in two places.

Q. You would not say then that 1008 sacks is not probably what you had on board there?

A. It might have been possible.

Q. About 1008 sacks?

A. Yes, sir. It might have been possible. I do not know—that is right too. It must have been 1,000 sacks because there is 900 pounds to a sack and 1,000 sacks make 90,000 pounds or 45 tons.

Q. You did not weigh them with respect to tonnage? A. No, sir.

Q. So when you say you are supposed to have 45 tons what do you base that on?

A. Mr. Stern said to me there was 45 tons of beans on the river and I was to be paid for 45 tons. I did not [82] know the amount, or the number of the sacks.

Q. Now, you loaded at two places? A. Yes, sir.

Q. Where was the first place?

A. That I cannot recall. I cannot recall his name, but it was something like Stollman or Scollman. I don't recall his name.

Q. Was that the Miner Slough? A. Yes, sir.

Q. Further up? A. Further up.

Q. I show you a drawing here and ask you if that is not a fairly accurate diagram of Miner Slough and

(Testimony of Paul Ewald.)

Cache Slough at the point where this happened?

A. I think Miner Slough runs more north.

Q. Just make it the way you think it is. Put it right on here your way.

A. I think Miner Slough would run more north, about three or four points more north, or northeast. Northeast and southwest.

Q. This would be your idea then of Miner Slough?

A. Yes, sir.

Q. We will mark that Miner Slough B, and we will call the other Miner Slough A, the way I gave it to you first. Now, you think Miner Slough B is about the way—

A. That is the way I think it runs, northeast and southwest.

Q. How many tons did you take on at the first point of loading?

A. I don't know, sir, the amount of tons.

Q. How many sacks?

A. I know there was a gentleman there and he says, "You will take all the beans that is on the bank," and I says, "All right." I went to work that Saturday evening and put 125 tons down in the hold.

Q. Tons or sacks?

A. Sacks—125 sacks not tons.

Q. 125 sacks you took at the first place of loading and what did you do with them?

A. I put them down in the after [83] hold.

Q. What did you have in the forward hold?

A. Nothing.

Q. Nothing? A. No, sir.

(Testimony of Paul Ewald.)

Q. Of those 125 sacks how many tiers were they piled in the after hold?

A. We just leveled them off; we had them three high.

Q. And how far forward did they go?

A. They go up to the aft mast.

Q. From here (pointing)?

A. From the cabin bulkhead.

Q. How far was the cabin bulkhead from the stern of the vessel?

A. You mean from the aft hatch, or from the stern of the vessel. You see, here is the bulkhead of the cabin, here comes the hatch and here is the main-mast.

Q. The after hatch was right up alongside of the after cabin, was it not?

A. Exactly; just about three feet from the cabin.

Q. And the after cabin was how many feet long? It ran clear to the stern, did it not?

A. No, sir, the cabin was about eight feet long and there are about seven or eight feet more to the stern.

Q. But she is a scow and she had a slant stern, did she?

A. She was a schooner-built scow with a running stern, a sharp stern like a sailing vessel. She was not a flat-bottom boat; she was a schooner-built boat.

Q. That is she had a sharp bow?

A. Sharp bow and running stern.

Q. How far was it from the aft mast up to her bow?

A. From the after mast to her bow, about 25 feet.

(Testimony of Paul Ewald.)

Q. And the full length of the vessel was what?

A. 45 feet. 45 or 46 feet. [84]

Q. You say you stowed the beans three high? Of course, if she had a sharp bottom you would not be able to stow it clear across three high?

A. Yes, sir; I stowed it clear across; her run don't commence until about halfway from the cabin, then her run commences. That is how the cabin is built, so that you will not lose no space in the whole cabin. It is right from where her run commences so you will not lose any space.

Q. What was the depth of the hold from the main deck down to the bottom?

A. From the main deck to the timbers, four feet.

Q. Are you giving these measurements by estimate or how? A. By estimate.

Q. When did you make the estimate?

A. A sailor, he generally don't measure a boat; he just goes by sizing the boat up. The hold might have been six inches deeper.

Q. Now, you came down with that 125 sacks in your hold from the upper landing place to the lower landing place, did you?

A. No, sir; we had some more beans left there on the landing which we put on the after deck.

Q. How many beans did you have there?

A. Just the remainder, what was left on the bank. I don't know how many sacks there was on the upper place, but I put 125 sacks down in the hold and the remainder went on deck.

(Testimony of Paul Ewald.)

Q. When you came down Miner Slough did you sail down?

A. Sunday morning I was pulled down by a horse and wagon to Totman's place.

Q. That is at the very end of Miner Slough where it goes into Cache Slough? A. Yes, sir. [85]

Q. Then you took the rest? A. Yes, sir.

Q. How many beans do you think you took?

A. Whatever was on the bank. There was a man who came down there and says, "Here is the beans," and I says, "All right."

Q. And those were also put on the upper deck?

A. Yes, sir.

Q. How many tiers high were they stowed on the deck? A. Five high.

Q. Was not there a third man there at the time you loaded these beans and who belonged to the vessel?

A. A third man?

Q. A third man? A. Only two men.

Q. Only yourself and one?

A. The other man the mate.

Q. You call him the mate?

A. Well, mate and cook; he is everything there; bottle-washer, deck-hand.

Q. How many masts did this vessel have?

A. Two.

Q. And you carried a mainsail and foresail and one jib? A. Yes, sir.

Q. Now, I understand that you hoisted your mainsail when you started out from Miner Slough?

A. Yes, sir.

(Testimony of Paul Ewald.)

Q. And you were sailing with the mainsail down the slough?

A. We had just started; we had a jib hoisted home-ward-bound and I told the man to go forward and hoist the mainsail; in the meantime the wind shifted from the northwest, filled in the mainsail and she took a sheer and went in the bank—

Q. Wait a minute. You had a jib then and mainsail up? A. Yes, sir, hoisted.

Q. And you were at the wheel?

A. I was at the wheel.

Q. On which side was your mainsail at this time?

A. It was, I believe, on the starboard tack. [86]

Q. That is, you were going down and the wind was coming over your right side and the sail was over the left? A. Yes, sir.

Q. And you were coming straight across the creek?

A. Yes, sir, sort of leading wind, not exactly three sheets.

Q. And then you say the wind hauled around to the northward? A. No, to the northwest.

Q. To the northwest? A. Yes, sir.

Q. Before that it had been coming from the west?

A. Westerly.

Q. How long did it take it to haul to the north-west? A. It seems to come in a puff.

Q. That is all, just one puff?

A. Yes, sir; I had to put the helm hard-up; she would not sheer up; she just keep on going.

Q. And your mainsail was jibbed?

(Testimony of Paul Ewald.)

A. No, sir; I had her going out; the main sheet was slacked away.

Q. That is, you had to leave your wheel to get to the main sheet? A. I lashed the wheel down.

Q. And ran over to the main sheet to ease her out?

A. Yes, sir.

Q. And at that time the other man was forward trying to raise the foresail; is that right?

A. Exactly.

Q. How long did it take you to let go of your main sheet?

A. Only just two minutes, less than two minutes.

Q. By the time you had let go of your main sheet were you in the bank?

A. No, sir, but the wheel was hard-up. She took a sheer then.

Q. She took a sheer again?

A. When the puff of wind came I had the wheel hard-up. I lashed the wheel. She was coming [87] toward the bank.

Q. She sheered up, then, before you left the wheel?

A. Yes, sir.

Q. And before you got back she was in the bank?

A. Yes, sir.

Q. How far was the point where she struck the bank from the mouth of Miner Slough?

A. 200 feet, I guess.

Q. 200 feet? A. Yes, sir.

Q. Then, as a matter of fact, Captain, you were coming down Miner Slough in a westerly direction, weren't you? A. Yes, sir.

(Testimony of Paul Ewald.)

Q. And it was necessary, then, for you to come around to the southward, was it not? A. Yes, sir.

Q. And you were doing that, were you not, before this thing happened? A. Yes, sir.

Q. Were you already on the southerly course when this thing happened?

A. We were already on her southerly course.

Q. Were you in the middle of the stream?

A. About over here, sir, about there.

Q. When you say about there, what do you mean by that? A. Somewheres around there.

Q. Mark with the line there an arrow.

A. You must understand when we pulled out—

Q. (Intg.) Let us get this first. Is that right where the arrow is? A. Yes, sir.

Q. Going on that course? A. Yes, sir.

Q. You had plenty of room, did you not, then, to go down the slough in that position?

A. Plenty of room.

Q. Just mark there about in what angle your mainsail was. Mark at what angle your mainsail was at that time, just as though that was the boat.

A. Yes, sir. [88]

Q. The mainsail was out like that? A. Yes, sir.

Q. We will call that C-D, the position of the mainsail. Is that right? A. That is right.

Q. Now, Captain, the wind, then, at that time, was in the direction of the arrow E-F, was it not? That was westerly? A. Yes, sir.

Q. That was the way you were sailing?

A. Yes, sir.

(Testimony of Paul Ewald.)

Q. Now, you say the wind came around a little to the northward? A. To the northwest.

Q. Just mark with an arrow up here about how the wind changed. A. Yes, sir.

Q. E-F, G-H. The wind had changed, then, to the direction G-H. That is right? A. Yes, sir.

Q. About the same strength of wind as you were having from the E-F direction?

A. About the same strength.

Q. That was pretty nearly dead aft, was it not?

A. Almost aft.

Q. Then you say the vessel sheered towards the right; towards the right bank?

A. Yes, sir, she luffed up to the bank.

Q. And then you ran forward and let go the sheet so as to throw your mainsail out in this direction?

A. Yes, sir.

Q. In the direction D-K. That is what you did?

A. Yes, sir.

Q. Then what did she do?

A. Then she sheered in to the bank.

Q. About where did she strike the bank? Mark the place on that paper.

A. About like this. She sheered there and then she sheered off.

Q. Then she went in the direction of the continuous line ending with an arrow head at L. Is that right? That is, she went there and struck the bank at the point you have marked and then out in the direction like that? Is that right? [89]

[Answer omitted in original certified typewritten Record.]

(Testimony of Paul Ewald.)

Q. Don't you think that if instead of letting go your main sheet you had hauled it and jibed your mainsail such a thing could not have happened?

A. No, sir.

Q. Why?

A. As the wind is blowing from here, if I would have jibed the mainsail she would have all the more come in the bank. She would have come head on.

Q. And you think that is what she would have done? A. Yes, sir.

Q. How do you know there was a snag or anything at the bank?

A. I did not know there was a snag.

Q. How did you know afterwards; did you ever go and examine the place. A. I did not.

Q. You are just guessing.

A. By the hole in the schooner there must have been a snag. Because Cache River is deep from bank to bank.

Q. How high up was the hole in her, if you know?

A. It was in the side, sir.

Q. How far below her rail?

A. She was just about four, five or six inches below the water-line; that is, below the water.

Q. You mean when she was on an even keel?

A. Yes, sir, when she was on an even keel.

Q. How long did you sail after that before she capsized?

A. We struck the bank there and she sheered off, and then the mainsail jibed and all the remaining sails jibed and just about there where the arrow is—

(Testimony of Paul Ewald.)

I was halfway across, she turned over.

Q. As quick as that?

A. Yes, sir, she jibed over quick.

Q. Then she turned over almost immediately after she struck? A. Almost. [90]

Q. There was no appreciable time between the time of striking and upsetting?

A. No, sir; five minutes.

Q. The river is about 150 feet wide there and you probably went 50 feet from the bank when you upset? A. Yes, sir.

Q. And you were coming pretty quick at that time, weren't you?

A. From the place it did not take any time.

Q. It must have been a few seconds.

A. Five seconds, I should think.

Q. Would it take you five minutes to go 50 the way you were going then?

A. I had time to lower the mainsail, foresail and the jib; I let go the helm and they dropped right off.

Q. They dropped right off?

A. That is all the time I had.

Q. You did it yourself or the other man?

A. I told him to let go the jib.

Q. He was there? A. Yes, sir.

Q. And you let go the mainsail?

A. The mainsail and foresail.

Q. The foresail was not up, was it? A. Yes, sir.

Q. And before they were down she was over?

A. Yes, sir.

Q. So you don't know, as a matter of fact, whether

(Testimony of Paul Ewald.)

she filled with water, or what actually happened. All you know is as soon as she struck the bank you dropped the sails and by the time you had them dropped she turned turtle? That is all you know about it? A. Yes, sir.

Mr. FRANK.—We will offer this diagram in evidence and ask that it be marked Libelant's Exhibit "A."

(The diagram is marked Libelant's Exhibit "A.")

Q. Where is this other man?

A. I don't know, sir.

Q. What was his name?

A. I don't know his name, either.

Q. How long had you been sailing with him?

A. He has been [91] with me only three days.

Q. At that time? A. Yes, sir.

Q. What are you doing now on the "L. Aguador"?

A. I am deck-hand there.

Q. Deck-hand? A. Yes, sir.

Q. And between the time of this accident and the present time what have you been doing?

A. I have been sailing.

Q. Before the mast? A. Yes, sir.

Q. As deck-hand?

A. I have been doing longshore work for a year and I have been sailing in scows. I had the "Maggie Hartman" for Scott, Wagner and Miller. I was running the "Rough-and-Ready" for Harry Tietzen, and the "Wingfield Scott."

Q. That is all since the accident to the "Francis E. M. Bernard"? A. Yes, sir.

(Testimony of Paul Ewald.)

Q. The "Francis E. M. Bernard" was the first boat you ever ran?

A. Yes, sir, that is as master.

Q. You were deck-hand before that all the time?

A. Yes, sir.

Q. Do you know how old the "Francis E. M. Bernard" was at that time?

A. No, sir; I do not know in what year the boat was built.

Q. You say she had been fixed up shortly before that. Did you have anything to do with fixing her up?

A. Yes, sir; I was there, that is when Captain Murrel was there; I always was up there at Anderson's ways.

Q. What did they do to her then?

A. They put new planking in her.

Q. What planks? A. New planks.

Q. Outside planks? A. Yes, sir.

Q. For the whole vessel?

A. No, sir, just where it was necessary. [92]

Q. How many planks did they put in her?

A. I don't know, sir.

Q. You have no idea? A. No, sir.

Q. I suppose her planks were rotten and they had to remove them?

A. Some of them; wherever it was necessary they had new planks.

Q. Because it was rotten?

A. The boat was like any other boat, it needs fixing.

(Testimony of Paul Ewald.)

Q. You answer my question, if you know. It needed fixing because her planking was rotten? Is that so? A. Yes, sir.

Q. Is that all they did to her is to put new planking in her? A. Yes, sir, that is all.

Q. And you don't know how many planks were put on her—

Mr. HUTTON.—(Intg.) You were going to say something; what was it?

A. (Contg.) After the planking is in you have to caulk the planks.

Q. That is, caulk her where the planks were put in? A. Yes, sir.

Q. You do not mean they caulked her generally, but just in the particular seams where the planks were put in her? A. Yes, sir.

Q. And that is all? A. Yes, sir.

Q. And what had been done to her previously to that you do not know anything about what had been done to her before that? A. No, sir.

Q. And you do not know of any other repairs made to her?

A. Yes, sir; they were making repairs almost every six months to that boat.

Q. Were you present? A. Yes, sir.

Q. What other repairs did they make on her that you saw? [93] A. Fixing up the prick-posts.

Q. What is a prick-post?

A. That is between the center-board casing. Here is the prick-post here and forward where the center-board runs in the casing.

(Testimony of Paul Ewald.)

Q. That is the fore and aft ends of the center-board casing? A. Yes, sir.

Q. Did they fix that up?

A. Yes, sir, they had them fixed.

Q. What was the matter with them?

A. The center-board casing got rotten and they put a new one in.

Q. Anything else? A. No, sir.

Q. That is all that you remember of the repairs that had been made in her? A. Yes, sir.

Q. You said something about a scow will act contrary, sometimes they will not handle. What do you mean by that?

A. You can have your helm hard up or hard down and the boat will not answer her helm.

Q. Why?

A. For some reason when I was in the "Rough-and-Ready" the same thing *the same thing* happened; I had her helm hard down leaving the dock and she would not come to the wind.

Q. Had you experienced this difficulty with the "Francis E. M. Bernard" where she would not answer her helm? A. If a boat—

Q. I am asking you about the "Bernard" now.

A. Yes, sir.

Q. You had that difficulty with her before?

A. Yes, sir; when a boat runs speedy she will not answer very quick.

Q. Answer my question; did you have trouble with the "Bernard" in not answering her helm very subsequently before this time? A. Yes, sir.

(Testimony of Paul Ewald.)

Q. And you don't know what the reason is?

A. No, sir. [94]

Q. And you think the accident really happened this time because she would not answer her helm?

A. Yes, sir.

Q. Did you ever see the boat after the accident?

A. No, sir.

Q. Don't you know what became of her at all?

A. Yes, sir, she is over at the landing.

Q. She is over at the landing? A. Yes, sir.

Q. What landing? A. Pinole.

Q. Now? A. Yes, sir.

Q. How long has she been there?

A. She has been there ever since she was towed down.

Q. She has never been used since the accident?

A. No, sir.

Q. Have you seen her there?

A. Yes, sir; she is lying there.

Q. How do you know she has been there ever since the accident?

A. The boat has never been in the bay since. The only way I have seen the boat is when I have been up by there in the train.

Q. That is all you know about it?

A. Yes, sir; that is all I know about the boat.

Q. How often have you been up there in the last five or six years? A. Seven or eight times.

Q. Pinole,—that is the place where Fernandez lives? A. Yes, sir.

Q. That is the home port, if I might use that term?

(Testimony of Paul Ewald.)

A. That is the home port.

Q. Did you have any liquor on board that time?

A. No, sir.

Q. No liquor on board? A. Not a drop.

Q. Did you have any liquor on shore?

A. No, sir.

Q. You had not been drinking at all?

A. No, sir.

Q. Had the man that was with you been drinking?

A. No, sir, not that I know of. [95]

Q. Of course, there was nothing the matter with those beans when you took them on board. They were all in good condition?

A. The beans were in good condition. I don't know if they were old or new. It does not matter to me; I don't know much about beans as long as I had them on.

Redirect Examination.

Mr. HUTTON.—Q. Do you know whether any water ran into the hold of the "Francis E. M. Bernard" after she struck the bank at that time?

A. There must have been water run into the hold.

Q. Did she sink?

A. No, sir, she did not sink; she turned over, turned turtle.

Q. Completely over? A. Completely over.

Q. Was that when you saw the hole?

A. No, sir; we did not see the hole until after she was raised.

Q. You saw it then? A. Yes, sir.

Q. How big a hole was it?

(Testimony of Paul Ewald.)

A. It was a hole between two timbers. It could not have been very big, that snag, and it seemed to strike the boat right between the timbers. Of course, I guess I could have put my hand through the hole.

Q. What can you say as to that hole; was it made by striking a soft or hard substance?

A. A hard substance.

Q. That is the result, you think? It would be caused by striking a snag, some hard substance?

A. Yes, sir.

Q. You stated you had your helm hard down?

A. Hard up.

Q. What effect would that have of throwing her on to the bank or off the bank? A. Off the bank.

Q. This man that you had, was he an average man for that work?

A. He has been scowing down the bay. I have seen him time [96] and time on Meiggs' wharf, and I shipped him. After that time I think he went to Seattle. He is a Seattle man. He told me he was going to Seattle to see his folks.

Q. Did the "Francis E. M. Bernard" act any different than any other boat would act in the quick change of the wind?

A. Any other scow would have done the same thing with that puff of wind; it was almost impossible to keep her off the bank.

Q. Did she steer as well as the average scow would steer? A. Like any other boat.

Q. You stated she would not answer her helm?

A. There are times they will act contrary. Many

(Testimony of Paul Ewald.)

times you get in a tide rip and a scow will not handle.

Q. That is caused by the tide rip? A. Yes, sir.

Q. No vessel will handle in the tide rip?

Mr. FRANK.—Don't lead the witness.

A. She must be a very sharp vessel, and a change of wind will affect the vessel.

Recross-examination.

Mr. FRANK.—Q. I thought you told me you never saw that hole? A. After she was raised.

Q. Where was she when you saw it?

A. I saw it in Rio Vista at that time.

Q. Where was the vessel when you saw it?

A. When I saw the hole?

Q. Yes. A. She was in Rio Vista.

Q. She was raised and brought to Rio Vista?

A. She was raised and towed down to Pinole.

Q. And after she was raised you saw her in Rio Vista? A. Yes, sir. [97]

Q. Was she pumped out?

A. Yes, sir, she was pumped out then.

Q. How did she come down, sail down?

A. No, sir, towed down.

Q. And you say it was a little bit of a hole in her side that you think you could get your hand through?

A. Yes, sir.

Q. And that was all the damage that was done to her? A. Yes, sir. [98]

**[Certificate of U. S. Commissioner to Testimony
Taken Under Order of Reference.]**

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, Francis Krull, a United States Commissioner for the Northern District of California, do hereby certify that in pursuance of the order of reference to take and report the testimony herein, that on Wednesday, March 26th, 1913, I was attended by Nathan H. Frank, Esq., as proctor for the libelant, and H. W. Hutton, Esq., proctor for respondent, and by the witness Paul Ewald, who was of sound mind and lawful age, and that the witness was by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in said cause; that the foregoing testimony was taken in shorthand by Herbert Bennett, and afterwards reduced to type-writing, pursuant to such order of reference.

IN WITNESS WHEREOF, I have hereunto subscribed my hand at my office in the City and County of San Francisco, State of California, this 28th day of May, 1913.

[Seal]

FRANCIS KRULL,

U. S. Commissioner, Northern District of California,
at San Francisco. [99]

(LIBELANT'S EXHIBIT "A" is here inserted in the original transcript of testimony taken before United States Commissioner.)

[Endorsed]: Filed Feb. 27, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [100]

[Record of Hearing, Saturday, November 1, 1913.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 1st day of November, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#13,495.

J. STERN et al.

vs.

CARLOTTA C. FERNANDEZ et al.

The motion for leave to make additional proofs herein this day came on for hearing, H. W. Hutton, Esq., appearing for defendant and Nathan Frank, Esqr., appearing for libelant. An amended libel was then filed and allegation as to presentment of claim denied for want of information. Mr. Hutton recalled B. H. Tietjen for further examination, and the case was then continued for five days for libelant to put in evidence in rebuttal. [101]

[Title of Court and Cause.]

Amendment to Libel.

To the Honorable the District Court of the United States in and for the Northern District of California, Division One.

Upon leave of Court first duly had, the libelants

hereby amend their libel in the above-entitled cause by alleging as follows:

I.

That at all the times in said libel mentioned, said B. Fernandez was the owner of said schooner "Francis E. M. Bernard."

II.

That heretofore, to wit, on the — day of —, 19—, the said libelants duly presented their claim for the matters and things in said libel set forth to Carlotta C. [102] Fernandez and Thomas B. Fernandez, the executrix and executor of the estate of said B. Fernandez, deceased, and that the said claim was thereafter rejected by said executrix and executor.

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Libelants.

State of California,

City and County of San Francisco,—ss.

J. Stern, being duly sworn, deposes and says: That he is a member of the firm of J. Stern & Co., libelant in the above-entitled cause; that he has read the foregoing amendment to libel and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon information and belief, and that as to those matters he believes it to be true.

J. STERN.

Subscribed and sworn to before me this 1 day of November, 1913.

[Seal]

CHARLES EDDMAN,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 9th, 1914.

[Endorsed]: Filed Nov. 1, 1913. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [103]

[Title of Court and Cause.]

Opinion.

NATHAN H. FRANK and IRVING H. FRANK, Proctors for Libellant.

H. W. HUTTON, Proctor for Defendants.

In October, 1904, libellant shipped on board the schooner "Francis E. M. Bernard," belonging to and operated by respondents' testate, 1008 sacks of beans, to be carried from a point on the tributary of the Sacramento River to San Francisco. The "Bernard" ran into a snag on the bank which made a hole in her bow, through which water entered and shortly thereafter she turned over and sank and the cargo was lost.

Respondents claim that the loss was due to perils of navigation, and that the "Bernard" was in all respects properly fitted and manned. The testimony of respondents' witnesses support in every respect their claim. But libellant argues that no sufficient peril of navigation is shown, and that the manner of the accident itself, on the theory of *res ipsa lo-*

quitur, shows that she could not have been properly manned and [104] fitted, that the cargo must have been improperly stowed. Testimony was also presented by both parties as to whether or no the cargo was in fact properly stowed.

Upon the whole case I am inclined to the view that respondents have sufficiently accounted for the accident to relieve them from responsibility therefor.

Judgment will therefore be entered in their favor.

December 5th, 1913.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Dec. 5, 1913. W. B. Maling,
Clerk. By Francis Krull, Deputy Clerk. [105]

[Decree Dismissing Libel.]

*In the District Court of the United States, in and for
the Northern District of California, First
Division.*

IN ADMIRALTY—No. 13,495.

J. STERN et al., etc.,

Libelants,

vs.

CARLOTTA C. FERNANDEZ and THOMAS B.
FERNANDEZ, as Executrix and Executor
of the Last Will of B. FERNANDEZ, De-
ceased,

Respondents.

This cause having been heard on the pleadings and proofs, and due deliberation being had in the prem-

ises, it is now ordered, adjudged and decreed, by the Court, that for and in consideration of the matters and things set forth in the pleadings, and shown by the proofs herein, that libellants take nothing from the respondents, but that the libel herein be, and the same is hereby dismissed, and that respondents have and recover their costs herein to be taxed.

Dated, December 15, 1913.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Dec. 15, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [106]

[Title of Court and Cause.]

Notice of Appeal.

To Carlotta C. Fernandez and Thomas B. Fernandez,
Executrix and Executor of the Last Will and
Testament of B. Fernandez, Deceased, Respond-
ents Above Named, and to H. W. Hutton, Esq.,
Their Attorney:

PLEASE TAKE NOTICE, that J. Stern and B. Fleischer, partners doing business under the firm name and style of J. Stern & Company libelants in the above-entitled cause, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree of the District Court of the United States, in and for the Northern District of California, entered in said cause on the 15th day of December, 1913, and from the whole of said decree.

Dated, February 19th, 1914.

NATHAN H. FRANK,
IRVING H. FRANK,

Proctors for Libelants. [107]

Receipt of a copy of the within Notice of Appeal is hereby admitted this 19th day of February, 1914.

H. W. HUTTON,

Proctor for Respondents.

[Endorsed]: Filed Feb. 20, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [108]

[Title of Court and Cause.]

Assignment of Errors.

Now come J. Stern and B. Fleischer, partners doing business under the firm name and style of J. Stern & Co., libelants in the above-entitled cause, and assign the following errors in said cause, to wit:

1. The Court erred in finding that the loss of the beans in question was due to perils of navigation.

2. The Court erred in finding that the "Francis E. Bernard" was in all respects fitted and manned.

3. The Court erred in finding that the "Francis E. Bernard" was seaworthy at the time of commencing the voyage in question.

4. The Court erred in finding that the said vessel was properly manned. [109]

5. The Court erred in finding that the respondents have sufficiently accounted for the accident to relieve them of their responsibility therefor.

6. The Court erred in failing to find that the loss of said beans was due to the negligence and careless-

ness of the said respondents.

7. The Court erred in ordering the dismissal of said Libel.

8. The Court erred in failing to enter a decree in favor of libelants for the damages sustained by them by reason of the loss of said beans, together with interest and costs.

Respectfully submitted,

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Libelants.

[Endorsed]: Apr. 20, 1914. W. B. Maling, Clerk.
By C. W. Calbreath, Deputy Clerk. [110]

[Title of Court and Cause.]

**Order Extending Time to File Apostles on Appeal
and Assignment of Errors.**

Good cause appearing therefor, IT IS HEREBY ORDERED, that the libelant and appellant herein, J. Stern and B. Fleischer, partners doing business under the firm name and style of J. Stern & Company, may have to and including the 10th day of April, 1914, within which to file the Apostles on Appeal and Assignment of Errors herein in the United States District Court of Appeals.

Dated March 31, 1914.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Mar. 31, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [111]

**[Certificate of Clerk U. S. District Court to Apostles
on Appeal.]**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, hereby certify the foregoing and hereunto annexed 111 pages, numbered from 1 to 111, inclusive, contain a full, true and correct Transcript of the records, as the same now appear on file and of record in the clerk's office of said District Court, in the cause entitled J. Stern and B. Fleischer, Partners Doing Business Under the Firm Name and Style of J. Stern & Co., Libelants, vs. B. Fernandez, Respondent, and numbered 13,495, and which said Transcript is made up pursuant to and in accordance with "Praecipe for Apostles on Appeal" (copy of which is embodied in said Transcript), and the instructions of Messrs. Nathan H. Frank and Irving H. Frank, proctors for libellants and appellants herein.

I further certify that the costs of preparing and certifying to the foregoing Apostles on Appeal is the sum of fifty-five dollars and sixty cents (\$55.60), and that the said sum has been paid to me by proctors for appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 20th day of April, A. D. 1914.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk. [112]

[Endorsed]: No. 2409. United States Circuit Court of Appeals for the Ninth Circuit. J. Stern and B. Fleischer, Partners Doing Business Under the Firm Name and Style of J. Stern & Company, Appellant, vs. Carlotta C. Fernandez and Thomas B. Fernandez, Executrix and Executor of the Last Will and Testament of B. Fernandez, Deceased, Appellees. Apostles. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Received and filed April 20, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the District Court of the United States in and
for the Northern District of California, First
Division.*

IN ADMIRALTY—No. 13,495.

J. STERN and B. FLEISCHER, Partners Doing
Business Under the Firm Name and Style of
J. STERN & COMPANY,

Libelants,

vs.

CARLOTTA C. FERNANDEZ and THOMAS B.
FERNANDEZ, Executrix and Executor of
the Last Will and Testament of B. FERNAN-
DEZ, Deceased,

Respondents.

**Order Extending Time to [March 31, 1914, to] File
Apostles on Appeal and Assignment of Errors.**

Good cause appearing therefor, IT IS HEREBY ORDERED, that the libelant and appellant herein, J. Stern and B. Fleischer, partners doing business under the firm name and style of J. Stern & Company, may have to and including the 31st day of March, 1914, within which to file the Apostles on Appeal and Assignment of Errors herein in the United States Circuit Court of Appeals.

Dated March 21st, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Mar. 31, 1914, to File Record Thereof and to Docket Case. Filed Mar. 21, 1914. F. D. Monckton, Clerk.

*In the District Court of the United States in and
for the Northern District of California, First
Division.*

IN ADMIRALTY—No. 13,495.

J. STERN and B. FLEISCHER, Partners Doing
Business Under the Firm Name and Style of
J. STERN & COMPANY,

Libelants,

vs.

CARLOTTA C. FERNANDEZ and THOMAS B.
FERNANDEZ, Executrix and Executor of
the Last Will and Testament of B. FERNAN-
DEZ, Deceased,

Respondents.

**Order Extending Time to [April 20, 1914, to] File
Apostles on Appeal and Assignment of Errors.**

Good cause appearing therefor, IT IS HEREBY
ORDERED, that the libelants and appellants herein,
J. Stern and B. Fleischer, partners doing business
under the firm name and style of J. Stern & Com-
pany, may have to and including the 20th day of
April, 1914, within which to file the Apostles on
Appeal and Assignment of Errors herein in the
United States District Court of Appeals.

Dated April 10, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 11, 1914. F. D. Monckton, Clerk.

No. 2409. United States Circuit Court of Appeals for the Ninth Circuit. Orders Under Rule 16 Enlarging Time to April 20, 1914, to File Record Thereof and to Docket Case. Re-filed Apr. 21, 1914. F. D. Monckton, Clerk.

**[Stipulation that Title of Court and Cause be
Omitted from Captions in Printing of Record
on Appeal.]**

*In the United States Circuit Court of Appeals in and
for the Ninth Circuit.*

No. 2409.

J. STERN and B. FLEISCHER, Partners Doing
Business Under the Firm Name and Style of
J. STERN & CO.,

Libelants and Appellants,

vs.

CARLOTTA C. FERNANDEZ, Executrix, and
THOMAS B. FERNANDEZ, Executor, of
the Last Will and Testament of B. FER-
NANDEZ, Deceased,

Respondents and Appellees.

IT IS HEREBY STIPULATED by and between
the respective parties hereto that in printing the
record on appeal, the title of court and cause may
be omitted in all captions except that of the Libel
and of the Final Decree, and in lieu thereof, the

mere statement "Title of Court and Cause" shall be inserted.

Dated May 6, 1914.

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Libelants and Appellants.

H. W. HUTTON,

Proctor for Respondents and Appellees.

[Endorsed]: No. 2409. In the United States Circuit Court of Appeals in and for the Ninth Circuit. J. Stern et al., Libelants and Appellants, vs. Carlotta C. Fernandez et al., Executrix and Executor, etc., Respondents and Appellees. Stipulation That Title of Court and Cause be Omitted from Captions in Printing of Record on Appeal. Filed May 9, 1914. F. D. Monckton, Clerk.

No. 2409

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. STERN and B. FLEISCHER, partners doing
business under the firm name and style of
J. STERN & COMPANY,

Appellants,

VS.

CARLOTTA C. FERNANDEZ and THOMAS
B. FERNANDEZ, executrix and executor of
the last will and testament of B. FERNANDEZ,
deceased,

Appellees.

Upon Appeal From the United States District Court for the
Northern District of California.

BRIEF FOR APPELLANTS.

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Appellants.

Filed this..... day of October, 1914.

FRANK D. MONCKTON, Clerk.

OCT 19 1914

By..... Deputy Clerk.

F. D. Monckton,

No. 2409

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. STERN and B. FLEISCHER, partners doing
business under the firm name and style of
J. STERN & COMPANY,

Appellants,

vs.

CARLOTTA C. FERNANDEZ and THOMAS
B. FERNANDEZ, executrix and executor of
the last will and testament of B. FERNANDEZ,
deceased,

Appellees.

Upon Appeal From the United States District Court for the
Northern District of California.

BRIEF FOR APPELLANTS.

In this case, the respondent took on board of his vessel a cargo of beans, belonging to the libelants, for transportation down the Sacramento river to the port of San Francisco, for which he issued his bill of lading.

The cargo consisted of 1008 sacks of beans, 125 sacks of which were stowed in the hold aft of the after mast (pp. 85-86), and the balance on deck, five tiers high (p. 88). In all, there was 45 tons of cargo (p. 84), and this distribution would make about 51½ tons in the hold, and 39½ tons on deck.

Immediately after the vessel was laden, she started on her voyage, and had progressed not exceeding two hundred feet (p. 90) when she ran into the bank, sheered off, and capsized, losing and destroying her entire cargo. She turned over almost immediately after she struck. She had not proceeded over 50 feet after striking the bank before she upset. The captain thinks it was 5 minutes (p. 94). At the time she struck the bank, she made a small hole in her side, about 5 or 6 inches below the water line (p. 93).

The man in command of the vessel was named Ewald, and this was his first trip as master. Previous to that he had served as deck hand (pp. 43 and 96), for 2½ years (p. 77), and at the time of testifying he was serving as deck hand on the "L'Aguador". The deck hand on the "Bernard" is "mate, cook, bottle washer and deck hand" (p. 88).

He was employed as master for the trip in question because the captain "did not show up." Mr. Tietjen, the manager of the vessel, told Ewald to get a man and make the trip and he (Tietjen) would make him captain when he came back (p. 44). The only knowledge Tietjen had of his competency as a master was the fact that he had been deck hand for two years,

and, about a year previous to this trip, the then master had told Tietjen that Ewald "was a good man", undoubtedly meaning he was a good man as a deck hand (pp. 44-45-46).

Under this state of facts, the defenses are urged:

1. That the loss was due to a peril of the sea.
2. That the owner is relieved from liability by the terms of the Harter Act.
3. That the owner is entitled to limit his liability to the value of the sunken vessel.

The District Court held that the vessel was properly fitted and manned, and that the loss was due to a peril of the sea, and the question presented by this appeal is whether or no the loss was due to a peril of the sea, and if not due to a peril of the sea, was the vessel seaworthy for the voyage in question.

WHAT WAS THE PERIL OF THE SEA?

The loss was due to one of two causes, viz.: either it was due to a puff of wind causing her to sheer and strike the bank, by reason of which she received a wound that let sufficient water into her to capsize her, or she capsized because she was laden so as to make her top-heavy and hence unseaworthy.

Assuming that the puff of wind was what caused her to strike the bank, neither the puff of wind, nor the hole caused by striking the bank, is a "peril of the sea."

Leaving the question of her improper lading for independent consideration, and adopting respondent's contention as to the cause of the accident, the injury received by striking the bank and consequent influx of water, is not the proximate cause of the damage. That must be referred back to the "puff of wind", which, according to respondent's contention, caused the vessel to sheer into the bank.

This proposition is settled in the decision of *THE G. R. BOOTH*, 171 U. S. 450. It was there held that damage to one part of the cargo by sea water entering a hole in the ship's side due to the explosion of another part of the cargo, was not due to a peril of the sea; that though the damage was occasioned by sea water, it was the explosion, and not the sea water, that was the proximate cause of the damage.

The cases illustrating the proposition are fully reviewed by the court, and the principle with which this

court is familiar, was applied to the exception, in a bill of lading, of "perils of the sea", viz.:

"The question is not what cause is nearest in time or place to the catastrophe. That is not the meaning of the maxim, *causa proxima non remota spectatur*. The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other, that the nearest is, of course, to be charged with the disaster."

Now, was this "puff of wind" a peril of the sea?

It is equally well settled that the ordinary perils which could reasonably be anticipated on the projected voyage, are *not* "perils of the sea" within the meaning of the term as used in the exceptions to a contract of carriage.

In the language of De Haven, J., in *THE ARCTIC BIRD*, 109 Fed. 169,

"The phrase 'perils of the sea' has reference only to those accidents peculiar to navigation, that are of an extraordinary character, or arise from irresistible force or overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence."

In this statement, Judge De Haven was quoting the language of Judge Story in *THE REESIDE*, which is also quoted by the court in *INSURANCE CO. v. EASTON ETC. TRANS. CO.*, 97 Fed. 655, with the suggestion that it

is approved in *GARRISON V. INSURANCE CO.*, 19 How. 312. In *INSURANCE CO. V. EASTON ETC.*, it is introduced with the assertion that

“Whatever may be the test of a peril of the seas, this much at least, may be safely said: The injurious force must be unusual; it must be out of the ordinary run of events,—such a violent happening *as is not fairly to be expected.*”

In that case a barge, on which the cargo was laden, was injured by bumping against another by reason of a fresh breeze encountered on the voyage, and the court held that the breeze was “not stronger than might be expected upon any voyage in the Chesapeake Bay during the month of October, and that hence the injury was not due to a peril of the sea.”

So, too, in *THE WESTMINSTER*, 127 Fed. 680 (C. C. A.), it was held that the circumstances must be such “as could not have been anticipated and guarded against by the exercise of ordinary care and prudence”, and the fact is adverted to that though the voyage was *tempestuous*, it was not beyond that which was to be expected on the Atlantic in March.

Finally (because in the end we shall contend that in any view of the facts the loss was due to the incompetency of the master), we call attention to the definition given by CHANCELLOR KENT, 3 Comm. 300:

“The ignorance or inattention of the master or mariners is not one of the perils of the sea. Those words apply to all those natural perils and operations of the elements which occur without the intervention of human agency, and which the prudence of man could not foresee, nor his strength resist. *Quod fato contingit et cuivis patrifamilias,*

quamvis diligentissimo possit contingere. The imprudence, or want of skill in the master, may have been unforeseen, but it is not a fortuitous event."

The effect of the words "peril of the sea" and like expressions, whether used in policies of marine insurance, bills of lading, or charter parties, is modified in all cases by the implied warranty of seaworthiness in much the same way as by the implied contract against negligence in contracts of carriage. If the loss proximately results from a breach of this warranty it will be attributed to that cause, notwithstanding the existence of the sea peril. *THE EDWIN I. MORRISON*, 153 U. S. 199; *THE CALEDONIA*, 157 U. S. 124.

With these principles in mind, what are the facts respecting the "puff of wind" in its relation to the accident?

The testimony on this subject is confined to the deposition of Paul Ewald, the master, and is epitomized in his first statement upon the subject (p. 78), where he says:

"Well, we set sail on Monday morning. We pulled across the river and there was a westerly wind blowing. We set the mainsail and jib, and we started off for home, and I told the man to go forward and hoist the foresail, and a *puff of wind* came up from the northwest,—*the winds are pretty uncertain up the river.* We had the helm hard down, and she sheered and went into the bank there and struck a snag there or a rut, and she made a hole in her starboard bow."

"Q. What happened?

A. We sheered her off, and I noticed she acted funny, and I tried to get on the other side, but before we got there she turned over."

Concerning this puff of wind, he says, in answer to a question as to whether or no the winds on the creek blow steadily:

“No, sir, the winds are pretty uncertain; you get amongst a bunch of trees, and a puff of wind comes up, and all at once it is calm again. *You always have to be on the alert*” (p. 82).

When asked how sailing vessels are liable to act when the wind changes suddenly, or comes in puffs, such as he got that morning, he answers (p. 83):

“Some of them will pay off, some of them will luff up to the wind.

Q. What did the ‘Frances E. M. Bernard’ do that morning, pay off, or luff up?

A. She luffed up; she went right to windward.”

He spoke of the “puff” as the wind shifting from the northwest, and he is asked (p. 89):

“Q. How long did it take it to haul to the northwest?

A. It seems to come in a puff.

Q. That is all, just one puff?

A. Yes, sir; I had to put the helm hard up; she would not sheer up, she just kept on going” (p. 89).

He had had trouble with the “Bernard” in not answering her helm, before, and does not know the reason (pp. 98-99), though he contends that “any other scow would have done the same thing with that puff of wind; it was almost impossible to keep her off the bank” (p. 101). “She must be a *very sharp vessel*, and a change of wind will affect the vessel (p. 102).

From the foregoing, it would appear that the puff of wind in question is an usual and ordinary incident on that voyage: "The winds are pretty uncertain, you get amongst a bunch of trees, and the puff of wind comes up and all at once it is calm again. You always have to be on the alert," and when such puff of wind comes, some vessels "will pay off, some of them will luff up into the wind."

Under these circumstances, it seems clear that the accident in question was not the result of a peril of the sea.

ACCIDENT DUE TO UNSEAWORTHINESS.

Was it, then, due to a "fault or error in navigation", or to the incompetency of the master, or the incapacity of the vessel to mind her helm? If it was either of the latter, the vessel was unseaworthy, and respondent is not entitled to the benefit of either the Harter Act, or the Act limiting liability.

This court has very thoroughly discussed the nature of the liability of a carrier with respect to the burden of proof, and the evidence necessary to sustain it, in the case of *THE MEDEA*, 179 Fed. 781, and among other cases there referred to, is the case of *THE MOHLER*, 88 U. S. 230, upon which this court comments as follows:

"In the case of *The Mohler*, 88 U. S. 230, 233, a cargo of wheat had been shipped on a barge appurtenant to the steamer *Mohler* at Mankato, on the Minnesota river, destined for St. Paul on the Mississippi. The bill of lading contained the usual exception of the 'damages of navigation.' The barge was wrecked by collision with one of the piers of a bridge just above the city of St. Paul and was totally lost. The answer set up that the accident occurred through the sudden and unexpected gust of wind which overtook the boat as she passed through the piers, and that, therefore, she was unanswerable for the collision. The case was heard on the testimony introduced by the respondents, the libelants having called no witnesses. The Supreme Court held that:

'The burden of proof lies on the carrier, and *nothing short of clear proof, leaving no reasonable doubt for controversy*, should be permitted to discharge him from duties which the law has annexed to his employment.' "

The court also quotes from *THE NEW JERSEY STEAM NAVIGATION CO. v. MERCHANTS BANK*, the statement that:

“The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties.”

So, also, we find the court in the case of *THE EDWIN I. MORRISON*, 153 U. S. 215, giving expression to the following regarding the evidence:

“We are unwilling by approving resort to mere conjecture as to the cause of the disappearance of this cap and plate to relax the important and salutary rule in respect of seaworthiness.”

In view of these authorities, what is the evidence concerning the vessel's seaworthiness in respect to the competency of the master?

As already stated, this was his first trip as master, and he was not in fact licensed, so no presumption arises in his favor.

Previous to this trip, he had served as a deck hand, which, according to his own statement, is a man who acts in the several capacities of “mate, cook, bottle washer and deck hand.” He had been serving in this capacity for 2½ years previous to the accident, and at the time of testifying, he was again serving as a deck hand.

Mr. Tietjen, the witness who was called to testify regarding this master's competency, and who had placed him in command for this trip, states that he placed him in command because the captain of the

vessel "did not show up", and Mr. Tietjen, the manager, desired to get the vessel off. He therefore told Ewald to get a man to make the trip, and when he returned he would make him captain, meaning thereby that he would enter him in the Custom House as master. The only knowledge which Mr. Tietjen had of his competency to go as master, was the fact that about a year previous to so appointing him, the master of the "Bernard" had told Tietjen that this man "was a good man", undoubtedly meaning that he was a good man as a deck hand.

"Q. He was not recommending him, then, to be captain of the vessel?

A. No; I had no show to put him captain.

Q. He was the deck hand on the vessel, and the captain in conversation with you said he was a good man; that is the substance of it?

A. Yes.

Q. That is all there was to it?

A. Yes" (p. 45).

Is that such "clear proof leaving no reasonable doubt for controversy" of his ability to go as master so as to render the vessel seaworthy?

In view of the accident happening as it did by reason of a "puff of wind", which is an ordinary incident to be expected on such a voyage, taken in connection with the foregoing facts, is not the presumption almost inevitable that the accident was the result of his incompetency? *THE CYGNET*, 126 Fed. 742.

In addition to this, we make the contention that the vessel was improperly laden (also by reason of his

incompetency), in this: That he placed $5\frac{1}{2}$ tons under deck, and $39\frac{1}{2}$ tons on deck, the deck load being five tiers high, and this, if not the sole cause of the capsizing of the vessel, was a contributing cause.

Upon this subject, the respondent has offered the testimony of the manager of the vessel, who was himself responsible for the captain, who says that at one time he had 50 tons of coal on her, 45 on deck, "and she sailed up the river all right; and he considered that she was properly loaded, enough to beat down on; she would be stiff enough to sail on" (p. 38). This loading to which he testified, occurred "eighteen or twenty years ago", and the only way that he knows she was so laden, is because

"I was down there when she took it in, and the captain said that he put five tons in the hold, and I said, 'Is she stiff enough with that?' And he said, 'Yes, she is stiff enough for sailing.' He said 'She is all right.' I never sailed her myself."

"Q. You never sailed her yourself?

A. No.

Q. And you had nothing to do with the loading of her at this time?

A. No, sir.

Q. All you know about it is that the captain told you she had five tons in the hold?

A. Yes, sir.

Q. That is all you know about the transaction?

A. I was there when she took in five tons; I asked him if that was all she required, and he said yes" (pp. 41-42).

Again:

"Q. Of course, you did not go with her?

A. No, sir.

Q. And you don't know anything about the nature of the winds and the weather on that trip?

A. No, sir, I don't remember anything about that.

Q. And you do not know anything about how she acted or behaved?

A. No.

Q. All you know is that she did not capsize?

A. She did not capsize. She came back all right" (pp. 42-43).

With respect to other loads which she has carried, he says that she carried the hay on deck.

"Of course she had a load full of hay and would carry as much as she could. *With barley*, we would not *fill* the hold because it was hard to get at" (p. 47).

JOHN ERICKSON, who had been handling schooners for about 21 years, but who had not navigated them any more than had Mr. Tietjen, or attended to the loading of them, except in the manner that Mr. Tietjen had, when asked what he would say with reference to loading the "Bernard" with 5 tons under deck, and 40 tons on deck, as to whether or not that is a proper means of loading a vessel, says:

"Well, it don't look to be hardly enough in the hold."

"You think that under those circumstances she would be improperly loaded?"

A. I would rule that she ought to have about one-third of it in the hold, or something like that. Of course some vessels are different from others" (pp. 60-61).

On cross-examination, he is asked:

"Q. Most of these scows are built so as to carry the cargo on the deck, are they not?"

A. Well, they carry a certain portion on deck; they carry about two-thirds on deck and about *one-third in the hold. That is about the rule with them.*

Q. That is with some scows?

A. *Most all of them*" (p. 61).

"Some of them are built so they carry nothing in the hold" (p. 61).

When asked about the scows that he is managing, he mentions two, with about 6½ ft. hold, that would carry about ½ in the hold, and ½ on deck (p. 62).

He also mentions one, which he says was built about the same as the "Bernard".

On cross-examination he admits that captains may disagree on the way to load a vessel, one man may think it is all right loaded a certain way, and another fellow may think it ought to be a little different—the man who is in the vessel would know more about how to load her, but

"Q. If a man had nothing to do with loading the vessel before, but was only deck-hand, cook and bottle-washer, you would not place very much reliance on his judgment, would you, after two years of that experience?

A. No, because some men don't take much notice" (p. 66).

The evidence on this subject is certainly not very satisfactory evidence of her proper lading. It is certainly not "clear proof, leaving no reasonable doubt for controversy."

Even though equal credit be given to both witnesses, the burden of proof being on the respondent, such

testimony could not prevail. But even that condition does not exist. We do not think that equal credit should be given to both witnesses, because, while with respect to experience they are probably upon an equal footing, yet Mr. Tietjen is open to the suggestion of bias, due to his connection with and moral responsibility for this loss.

In addition, we have the fact that it is common knowledge that a high deck load, with nothing underneath to counterbalance it, makes for instability, and if a vessel be stable in that condition, she is an exception to the rule. We have no doubt that there are scows that carry large deck loads, but they are broad square vessels, which is not the case with the "Bernard", which "was a schooner built scow, with a running stern like a sailing vessel; *she was not a flat-bottom boat*, she was a schooner built boat." She has a "sharp bow and a running stern" (Ewald, p. 86).

Appreciating the situation thus disclosed with respect to her instability, respondent attempts to account for her capsizing by contending that water flowed into her hold, and that the water caused her to capsize.

Here, again, he is depending upon uncertain and inconclusive testimony as to the amount of water that got into the vessel, and upon an inference not supported by the testimony.

Ewald makes the general statement, in response to a leading question, that she filled with water and capsized.

“Q. What made her turn over?

A. The water got in the hold.

Q. She filled with water?

A. She filled with water and capsized” (p. 79).

This, however, is a mere assumption on the part of the witness. He saw no water in the vessel. He did not even know that she had sprung a leak, until after she was raised. He says (p. 82):

“A. After she struck I know she acted funny right away and I says to this man there must be something the matter with her. He says ‘I cannot see nothing the matter with her.’ I tried to get her across the river to see what the trouble was with the boat and before we got half way she turned turtle and I had just time enough to lower down the mainsail, foresail, and the jib. Of course, at that time, the man and I was overboard; *the deck-load shifted*, the beans shifted, dumped over in the water. Of course, we was spilled into the water and the man and I, we swam for the shore” (p. 82).

Speaking of the time she struck the bank, he is asked:

“Q. How long did you sail after that before she capsized?

A. We struck the bank there and she sheered off, and then the mainsail jibed and all the remaining sails jibed and just about there where the arrow is—I was halfway across, she turned over.

Q. As quick as that?

A. Yes, sir; she jibed over quick.

Q. Then she turned over almost immediately after she struck?

A. Almost.

Q. There was no appreciable time between the time of striking and upsetting?

A. No, sir; five minutes.

Q. The river is about 150 feet wide there and you probably went 50 feet from the bank when you upset?

A. Yes, sir.

Q. And you were coming pretty quick at that time, weren't you?

A. From the place it did not take any time.

Q. It must have been a few seconds.

A. Five seconds, I should think.

Q. Would it take you five minutes to go 50 the way you were going then?

A. I had time to lower the mainsail, foresail and the jib; I let go the helm and they dropped right off.

Q. They dropped right off?

A. That is all the time I had.

Q. You did it yourself, or the other man?

A. I told him to let go the jib.

Q. He was there?

A. Yes, sir.

Q. And you let go the mainsail?

A. The mainsail and foresail.

* * * * *

Q. And before they were down she was over?

A. Yes, sir.

Q. So you don't know, as a matter of fact, whether she filled with water or what actually happened. All you know is as soon as she struck the bank you dropped the sails and by the time you had them dropped she turned turtle? That is all you know about it?

A. Yes, sir" (pp. 93-94-95).

The hole was about 4, 5 or 6 inches below the water line when she was on an even keel (p. 93), and, as the master says, "I guess I could have put my hand through the hole" (p. 101).

Of course, a hole 4 or 5 or 6 inches below the water line on an even keel, would be raised out of

the water with very little list in the opposite direction, and as the master says that immediately she struck she sheered, and almost immediately turned over, having gone but 50 feet from the bank, the hole could not have been under water sufficiently long to have taken any appreciable amount into the hold.

It is unreasonable to expect us to believe, under these circumstances, that it was the water she took on board that capsized her. She had just started on her voyage and her "acting funny" was undoubtedly due to the nature of her loading.

The testimony to the contrary is not only not "clear, leaving no reasonable doubt for controversy", but, on the contrary, it is unreasonable.

We respectfully submit, that not only has the respondent failed to sustain the burden of proof to show that the vessel was seaworthy, either in respect to her manning or her loading, but that the very nature of the accident itself raises a strong presumption of improper lading, and consequently of incompetency on the part of the master, and in this matter of incompetency, the owner was privy. *McGILL v. STEAMSHIP Co.*, 144 Fed. 795-6; *WELLESLEY v. C. A. HOOPER*, 185 Fed. 737.

Respectfully submitted,

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Appellants.

(see insert - next page)

EPITOME OF THE CASE ON IMPROPER LOADING.

Vessels do not capsize normally.

If they do capsize, the burden is on the shipowner to prove a cause relieving him from liability,

“and nothing short of clear proof, leaving no reasonable doubt for controversy, should be permitted to discharge him from duties which the law has annexed to his employment.”

“The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties.” *THE MEDEA*, 179 Fed. 781.

The respondent's only reply is an assumption or inference that the vessel took in sufficient water to make her capsize.

The only testimony upon this subject is that of Ewald, pp. 79, 82, 93, 94, 95 and 101, which shows that his statement that she filled with water is a mere assumption upon his part.

This inference or assumption is met by the contrary inference that a stable vessel with a hole large enough to put your hand through, 4 or 5 or 6 inches below the water line, on an even keel, will not take in an appreciable amount of water within five minutes, and particularly when she is sheered so as to list to the other side.

“Q. So you don't know, as a matter of fact, whether she filled with water, or what actually happened. All you know is as soon as she struck the bank you dropped the sails, and by the time you

had them dropped she turned turtle. That is all you know about it?

A. Yes, sir." (pp. 94-95.)

This is not clear proof, leaving no reasonable doubt for controversy. It does "depend upon implication or inference founded on doubtful evidence".

Under the circumstances, the natural presumption is that the vessel was improperly laden.

COMMON CARRIER.

Respondent has offered the suggestion that the vessel in this case was not a common carrier, and therefore is to be held only to ordinary care.

It is unnecessary to discuss this proposition. There are respectable authorities holding either way with respect to the degree of care required under such circumstances.

We would judge from the language of the Supreme Court in several cases, that the fact that a vessel is not a common carrier does not change the nature of its liability. Without making an examination of the cases to determine the extent of the expressions of the Supreme Court upon the subject, we content ourselves by calling attention to the language of the court in the case of *THE CALEDONIA*, 157 U. S. 134-35, where the court cites with approval the language of Judge Kent in his Commentaries, where, in speaking of the warranty of seaworthiness, he said:

“It is an implied warranty in the contract, that the ship be sound for the voyage, and the owner, *like a common carrier* is an insurer against *everything* but the excepted perils.”

At another place in said decision, in commenting upon the reasoning in the case of *READHEAD VS. MIDLAND R. R. Co.*, the Supreme Court remarked:

“But the court was careful to point out the broad distinction between the liabilities of common carriers of goods and of passengers, and in the case at bar *the shipowner* was not only liable *as such*, but as a common carrier, and subject to the responsibilities of that relation.”

The case cited by libelant refers to a discussion of the subject in the English case of *NUGENT VS. SMITH*, “in which a liability *like that* of a common carrier was upheld”, but was subsequently overruled in the court of appeals.

The similarity of this language to the language above quoted from *KENT* by our Supreme Court might possibly lead to the conclusion that the leaning of the Supreme Court is to a holding that the liability, though not that of a common carrier, was like that of a common carrier, and we are inclined to believe that that will be the ultimate decision, in view of the uniform holding against vessels [without distinction as to whether they be common carriers or not] that their liability is in the nature of insurers.

However, in the present case that question is immaterial, because it must be conceded that the warranty of seaworthiness, which is an implied warranty

in the contract of carriage by sea, is absolute, and does not depend upon whether or no the vessel be a common carrier. That distinction is recognized in *SUMNER vs. CASWELL*, relied upon by the respondent, as well as in the more recent case of *THE ROYAL SCEPTRE*, 187 Fed. 224. In both of those cases the question as to whether or no the vessel was a common carrier, was held to be immaterial.

A like question was involved, but not raised, in the case of the *S. S. WELLESLEY Co. vs. HOOPER*, 185 Fed. 737, before this court.

MOTION TO DISMISS.

That matter is not at issue before this court.

In the first place, the granting or denial of the motion, is a matter of discretion with the lower court, and not the subject of review here.

In the second place, the present record shows that the discretion of the court was properly exercised, inasmuch as the affidavit on which the motion to dismiss is founded, did not truly state the facts.

That affidavit sets forth that Fernandez was dead, and that his executor was not acquainted with the facts

“nor have I any knowledge or information upon which to prepare a defense thereto, my belief being that the whole of the facts and information necessary to prepare a defense to said action were in

the possession of the defendant alone at the time of his death." (p. 13.)

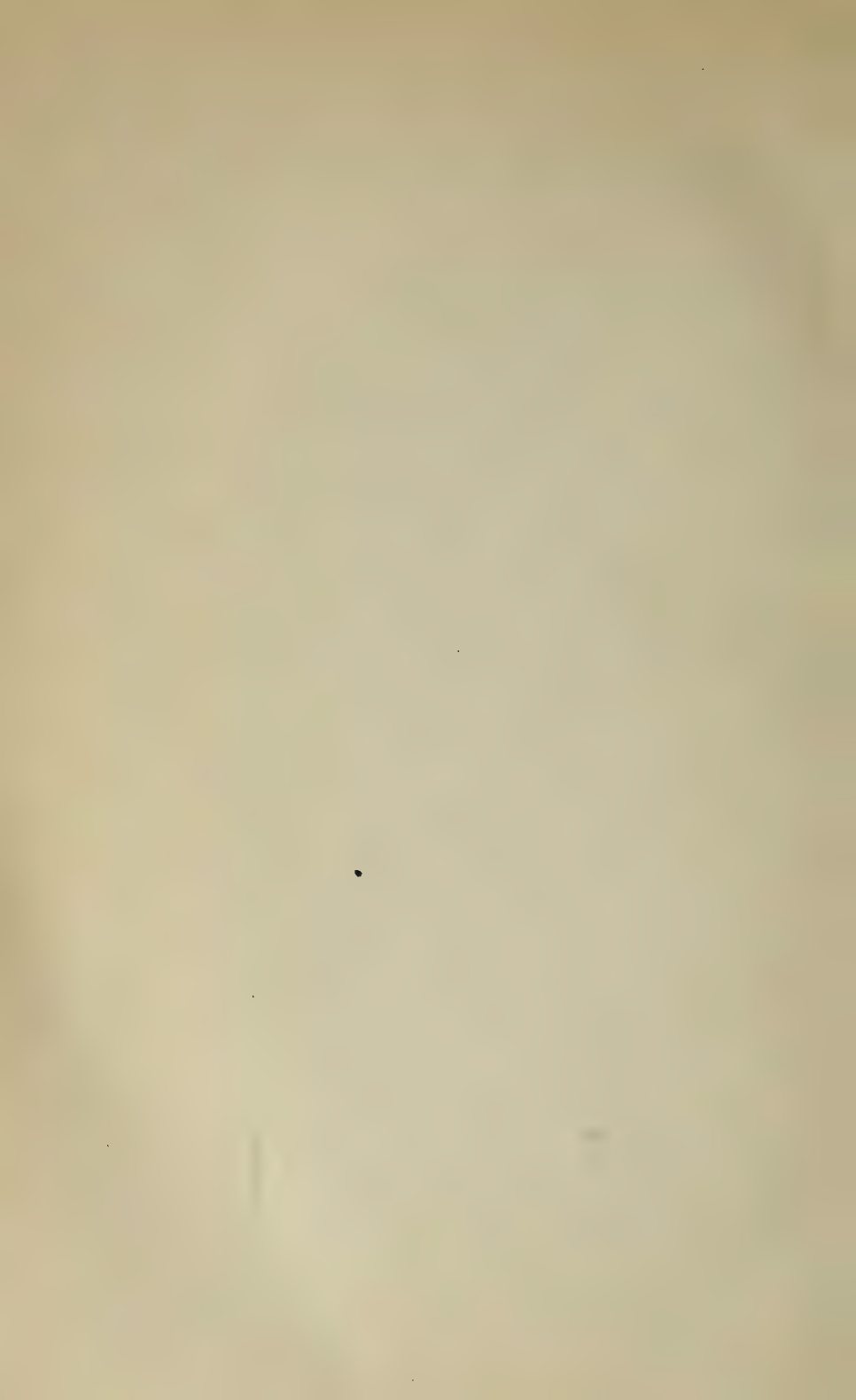
At the trial, however, they were at no loss for testimony. The vessel was not managed by the deceased, but by B. H. Tietjen, who had possession of all the facts necessary for a defense, and who was called as a witness, and the master of the vessel, who was the only one outside his deck hand who knew anything about the facts, was also called, and testified fully in regard thereto. No element of material testimony that ever had been in the possession of the respondent, is lacking in the record.

In the third place, if there be laches, both parties are equally guilty. The respondent had as much right to set the matter for hearing as had the libelant, and cannot profit by his own laches simply because libelant was equally guilty.

THE EXCEPTIONS TO THE LIBEL.

They were not for want of sufficient facts to state a cause of action, but only for uncertainty (pp. 8-9). Hence, the question of failure to state ownership of vessel was not raised.

Libel was subsequently amended so as to allege ownership (pp. 104-5).



12
No. 2409.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

J. STERN, et al., etc.,

Appellants,

vs.

CARLOTTA C. FERNANDEZ, et al., etc.,

Appellees.

Brief for Appellees.

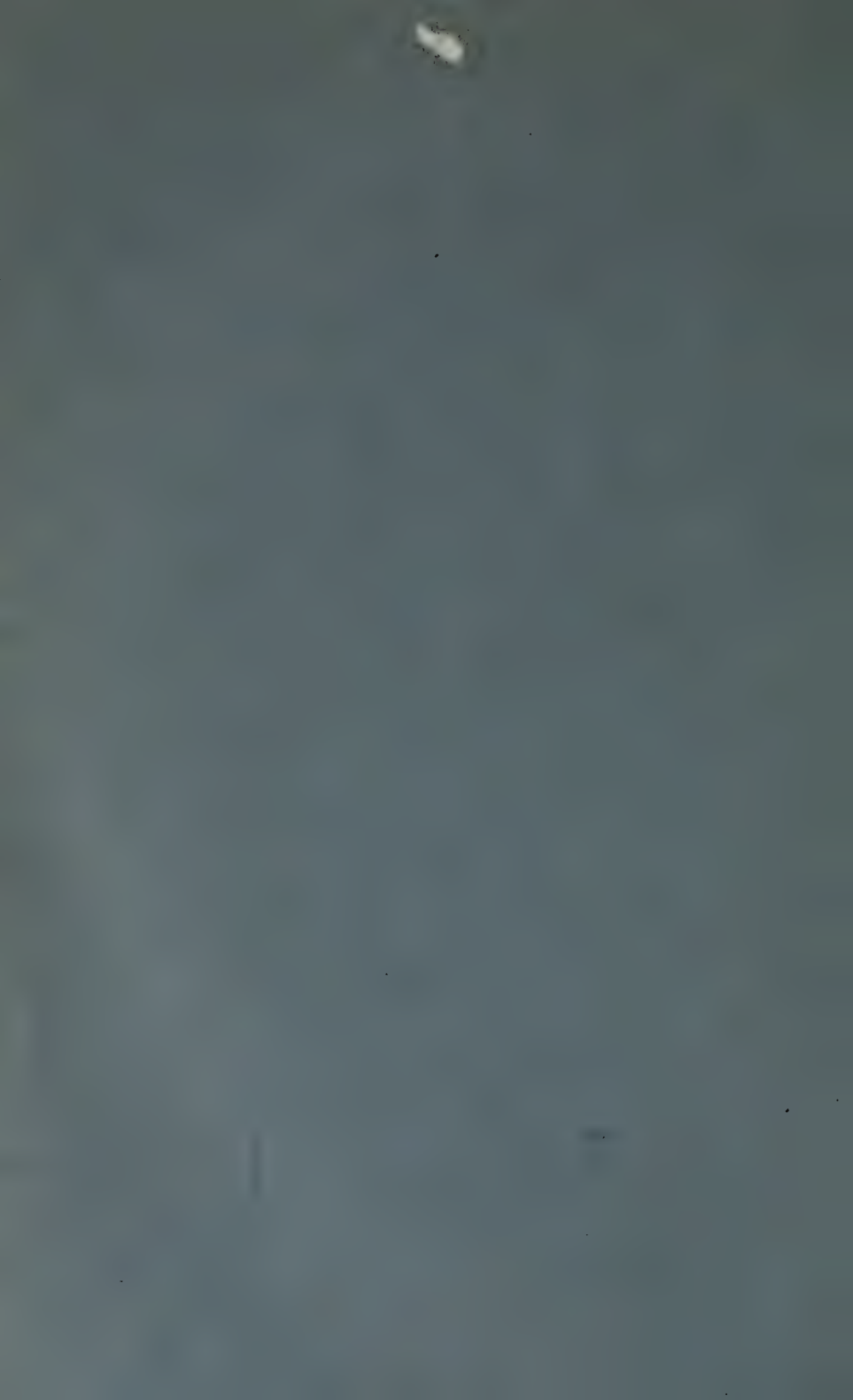
H. W. HUTTON,
Proctor for Appellees.

Filed this.....day of October, A. D. 1914.

F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

FILED
OCT 14 1914



IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

J. STERN, et al., etc.,	<i>Appellants,</i>	}	No. 2409.
vs.			
CARLOTTA C. FERNANDEZ, et al., etc.,	<i>Appellees.</i>		

BRIEF FOR APPELLEES.

In this case B. Fernandez owned the scow Frances E. M. Bernard, and on or about October 17th, 1904, there was placed on board of her on a branch of the Sacramento River called Minor's Slough, a number of sacks of beans, which for the purposes of this brief we will assume was 1008 sacks, weighing on an average 85 pounds per sack (p. 29), or 42.8 tons. 125 sacks or 5.62 tons were stowed down below and the remainder, 37.18 tons, on deck, and she was properly loaded (pp. 56, 78).

There is no question she was in good condition and

properly manned, leaving Minor's Slough, it appearing that she was loaded at about its mouth, and entering another water about 150 feet wide called Cache Creek the wind suddenly changed and she sheered over to the opposite bank, in spite of the efforts of the captain to prevent it (pp. 78, 81, 89, 90, 98, 101), and struck a snag in the bank and sheered off (pp. 78, 93, 100, 101, 102), the snag made a hole in the vessel, she got water in her, overturned and the beans were lost.

More than a year afterwards, Nov. 13th, 1905, libelants filed a libel, praying for damages, defendant appeared without the service of a citation and Dec. 8th, 1905, served and filed exceptions to the libel (p. 9), the exceptions were not brought on for hearing, and, B. Fernandez having died on the 12th day of May, 1912, appellees made a motion October 12th, 1912, asking to be substituted as respondents and that the libel be dismissed for laches. (Pp. 9 to 15) the motion to dismiss was denied, the motion to substitute granted (p. 15), the exceptions to the libel were overruled Nov. 11th, 1912. Defendants answered, the case was tried and the libel dismissed.

ARGUMENT.

I.

This vessel having the cargo of but one owner on board on a specific voyage was not a common carrier, but a mere private carrier carrying out the ordinary obligations of a bailee under a compensated bailment, and was held to ordinary care alone.

Sumner v. Caswell, 20 Fed., 249.

It is very clear that if the vessel had not struck the snag, water would not have entered her hold and the beans would not have been lost. Was the snag a peril of the sea, or the striking of it an unavoidable accident?

What is a peril of the sea?

Sec. 2199, Civil Code, which is in accordance with the Maritime Law, defines perils of the sea applicable to this case as follows:

“Sec. 2199. Perils of the sea are from:

“2. Rocks, shoals and rapids.

“3. *Other obstacles*, though of human origin.

“7. All other dangers peculiar to the sea.”

In the case of *Hibernia Ins. Co. v. St. Louis & New Orleans Trans. Co.*, 17 Fed., 478, a tow-boat started on a voyage with two barges in tow, one of the barges struck on a sand bar that had been recently formed, and it was held there was no fault, the other barge, the *Colossal*, *was unseaworthy* when she started, she

struck a sunken tree in about the same manner that the scow in question here did, and it was held that the accident was inevitable and there was no fault. The case was appealed and affirmed by the United States Supreme Court in

Same case on appeal, 120 U. S., 166.

If the change of wind is a usual, an ordinary incident of the voyage the *Frances E. M. Bernard* started to make in this case, it is clear that the hidden snag was not, as the master could not see it (p. 93).

"Q. How do you know there was a snag, or anything at the bank?

"A. I did not know there was a snag.

"Q. How did you know afterwards; did you ever go and examine the place?

"A. I did not.

"Q. You are just guessing?

"A. By the hole in the schooner there must have been a snag, because Cache River is deep from bank to bank.

"Q. How high up was the hole in her, if you know?

"A. It was in the side, sir.

"Q. How far below her rail?

"A. She was just about four, five or six inches below the water-line; that is, below the water."

The obstacle, whatever it was, was thus below the water, unobservable, a hard substance (p. 101).

"Q. What can you say as to that hole; was it made by striking a soft or hard substance?

"A. A hard substance.

“Q. That is the result you think? It would be caused by striking a snag, some hard substance?

“A. Yes, sir.”

So we have the case of a vessel starting on a voyage, before the sails are set and she has way on her, the wind suddenly changes—of course Ewald, the master, had no control over the wind—the vessel took a sheer, as any vessel is likely to do, he did everything he could to stop the sheer but was unable to; the vessel struck a snag that could not be seen, knocked a hole in her, water must have run in her unless the laws of nature were reversed in this case, as it is clear water will run through a hole if the hole is below its surface; it ran into the vessel's hold, destroying her stability, and she overturned. It is impossible to present a clearer case of inevitable accident.

II.

EWALD WAS COMPETENT.

Appellants' argument on the competency of Ewald is based upon the proposition that it was his first trip as master. If that argument is sound, all captains are incompetent on their first trip, all lawyers are incompetent on the trial of their first case, and in all lines of business a man must be incompetent the first time he fills any position. Appellants have not told us, however, how many trips a master would have to make before he became competent. If a master of a ship is incompetent on his first trip a Chief Engineer

must be also, and stay incompetent until the period arrives—but just when it would arrive appellants have not told us—that he becomes competent. If that was the law the present masters of vessels would have a monopoly, as no ship-owner would dare to make new captains, chief or other engineers, etc.

Ewald had been on this vessel at least two years. He evidently knew all about her—he had been there long enough.

All the testimony is that he was competent (p. 36). On pages 76 and 77 it appears that he had been captain on four scows. It is true that it was after this accident; but Tietjen appointed him master on the *Rough & Ready*, apparently, immediately afterwards. Then he worked for other people as master (p. 95). He worked for Tietjen two years as master (p. 48). Tietjen certainly knew something about him.

All the testimony and the facts showing that he was competent, as counsel is unable to point out anything that Ewald should have done that he did not do or point out anything that he did at that time that he ought not to have done, we are led simply to the proposition that appellants wish proven facts to be set aside by shadowy inferences. Tietjen had made inquiries about Ewald before he appointed him (pp. 44, 45).

III.

THE VESSEL WAS PROPERLY LOADED.

This vessel had a carrying capacity of 50 tons (pp. 38 and 41). On this trip she had but 42.8 on board, with 5.62 tons down below. Tietjen testified she had carried 50 tons, with 45 on deck and 5 down below, and his testimony is not hearsay, as he testifies, page 41:

"A. I was there when she took in 5 tons, I asked him if that was all she required and he said yes."

Tietjen had been agent of the vessel 8 years, he had known her many more years. He testified (p. 38) that the Frances E. M. Bernard was properly loaded at the time in question, also on page 56. Ewald testified (p. 78):

"Q. Was she loaded properly at that time?

"A. She was. She was in good trim.

"Q. The usual way of loading cargo of that kind?

"A. Exactly."

It is in evidence also that this vessel was very wide and shallow (pp. 38, 39, 40). She was about 18 feet wide and only 54 long, one-third as wide as she was in length.

Unseaworthiness in a vessel must be a contributing cause of the damage to be considered. There is not even that in this case, as there is nothing to show that

the vessel was improperly loaded. On the contrary, all the testimony is the other way; and again, if she was not properly loaded there is nothing to show that caused the vessel to turn over. It was the water in her hold. She would have turned over in any event, loaded properly, improperly, or empty, with a hole in her side or with water in her (pp. 65-75).

As to the testimony of Erickson, it is of no value in this case. On the whole, however, we think it supports the defense.

IV.

FINDINGS OF THE COURT.

The trial Court heard all of the witnesses but one testify. All the testimony seems to be one way, there is not even a conflict and the trial Court found (p. 106):

“Respondents claim that the loss was due to perils of navigation and that the ‘Bernard’ was in all respects properly fitted and manned. The testimony of respondents’ witnesses support in every respect their claim. . . .”

We are certain that everything in the record justifies that finding.

THE LIBEL SHOULD HAVE BEEN DISMISSED FOR LACHES.

The libel was filed Nov. 13th, 1905. The exceptions were filed Dec. 9th, 1905 (pp. 8 and 9). The exceptions were well taken as there was no averment in the original libel that Respondent Fernandez was in any way responsible for the damage claimed. All it shows is that the libelants had made a demand on him for payment and he had refused to pay. November 1st, 1913, amendments to the libel were filed; but from Dec. 9th, 1905, to October 7th, 1912, almost 7 years, and over 8 years from the time of the vessel's turning over, not a thing further was done by libelants. In the meantime respondent had died.

The Court denied the motion to dismiss upon the authority of

The Mariel, 6 Fed. Rep., 831.

That case was different to this and not near as much time had elapsed; in that case issue had been joined. The Court in that case, however, said that it denied the motion to dismiss, as that had been the practice of that Court, although other Courts had construed the same rule differently. The rules reading:

"136. If the promovent in a libel or information neglects to proceed in the cause with the dispatch the course of the Court demands, the respondent or claimant may have the libel or in-

formation dismissed on motion, unless the delay is by order of the judge, or the act of the respondent.

"123. So soon as issue is joined the respondent or claimant may notice a cause for hearing on his part and be thereupon entitled to a decree dismissing the same with costs or such other decree as the case may demand unless the libelant shall also notice the cause for the same time and proceed to trial, or obtain a continuance by order of the court on proper cause shown."

Those two rules refer to a case after issue is joined, *on exceptions*, the following rules of the District Court apply:

"Rule 94. DEMURRER. The defendant may on the return day of process, and before answering, demurring, or pleading, file an exception to the libel that it is multifarious or ambiguous, or without plain allegations upon which issue can be taken, and if it be adjudged by the Court insufficient for any of these causes, and be not amended by the libelant within two days thereafter, it shall be dismissed with costs.

"Rule 95. Proceedings upon such exceptions shall conform to those on exceptions to answers or other pleadings.

"Rule 96. INSUFFICIENCY. The libelant may within four days from the filing of the answer or claim, file exceptions thereto for insufficiency, irrelevancy, or scandal, which exceptions shall briefly and clearly specify the parts excepted to by line and page of the papers in the Clerk's office; whereupon the party answering or claiming *shall in four days either give notice to the libelant of his submitting to the exceptions* or set down the exceptions for hearing, and give four days notice thereof for the earliest day of jurisdiction after-

ward. In default whereof, the like order may be entered as if the exceptions had been allowed by the Court."

The record shows that the exceptions were served on the proctors for libelant on the 8th day of December, 1905, and filed on the next day. It was the duty of libelants to give notice within four days of submitting to the exceptions or set them down for hearing. Failing to do so, the exceptions stood as if allowed by the Court, and libelant was bound to amend within two days, or the libel was subject to dismissal.

Whatever time elapsed over that was merely an accommodation given by defendant to libelant, but defendant lost no rights by it.

LIBELANTS' BRIEF.

In the case of *The G. R. Booth*, 171 U. S., 450, it appears that one part of the cargo exploded. That was undoubtedly due to either the dangerous character of that cargo or an inherent defect in it, and of course in no way related to the elements, sea, storms, rocks or shoals, or any natural cause.

A change of wind is beyond human control. The wind in this case suddenly changed from *the west* to *the northwest*. The master did everything he could do to overcome the effect of the change but was unable to, and if it had not been for the snag there would

have been no damage. The "Bernard" steered just as well as any other scow (pp. 101-102).

"Q. Did she steer as well as the average scow would steer?

"A. Like any other boat.

"Q. You stated she would not answer her helm?

"A. There are times they will act contrary. Many times yet get in a tide rip and a scow will not handle.

"That is caused by the tide rip?

"A. She must be a very sharp vessel, and a change of wind will affect the vessel."

This vessel was built in 1865. It does not appear that she had ever been in trouble before. The channel was narrow in this case; wide enough to sail straight in, but with little room to maneuver in. It does not appear to have been an unusual thing for scows to strike the bank (p. 75) and changes of wind also affect a vessel.

Page 56.

"Q. With respect to a scow or these river vessels, or any sailing vessel, when they get in the river where they are liable to get a puff of wind from among the trees, or around there, what effect does it have on them?

"A. You have to manage them quick; sometimes you cannot do it, there is not room enough.

"Q. Is not that the case with all sailing vessels, whether they are scow schooners or ocean vessels or anything else.

"A. Yes, but especially on the Sacramento River, because you have not much time there.

Page 57.

"Q. Supposing the wind changes quickly; Captain, can you always hold her then?

"A. No; that is just where it comes in; when the wind is quick sometimes she comes back and jibes over quick.

"Q. Did you ever see the rudder on the 'Bernard'?

Page 58.

"A. Yes.

"Q. Was it a small rudder or a large rudder or an average rudder.

"A. It was a good, large rudder for her."

Libelants' brief does not clearly show their position. There is no denial that the vessel received a wound under water; water must have run in the hold. No vessel has ever yet been known to successfully make a voyage with a hole in her side through which water runs. As soon as the master found that she had received some injury he tried to do the only thing he could do, get her over to the other side and beach her. There is no proof to show that was not the proper thing to do. He did the best he could, and while doing the proper thing the vessel overturned. The fact that she overturned within five or any other number of minutes simply shows that the extent of the injury was sufficient to overcome the stability of the vessel at the moment she overturned. If the injury had been greater she would have overturned quicker.

If it had not been as great, she would not have lost her stability so soon. It is simply a question of cause, and the time when the effect relatively happened.

We submit that all B. Fernandez was held to was ordinary care, he was not an insurer; that this was an inevitable accident and no fault can be attributed to any one, and that the libel was properly dismissed on the merits and should have been dismissed on the motion praying for a dismissal.

Respectfully.

H. W. HUTTON,
Proctor for Appellees.

